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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

M & J COAL COMPANY and
MONONGAH DEVELOPMENT COMPANY,
Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the actions of agents of the U.S. Department of the Interior, Office of Surface Mining, in requiring petitioners to leave in the ground coal which was otherwise commercially and economically feasible to mine, and as to which petitioners had valid deeds, all necessary mining rights, including the right to subside private dwellings, and a state-issued mining permit, constituted a compensable regulatory taking under the Fifth Amendment.
2. Whether the determination by the court below that petitioners had failed to establish a cognizable property right to mine coal pursuant to a state-approved subsidence control plan and to subside private dwellings was clearly erroneous.
3. Whether government regulatory action purporting to protect the public health and safety, which takes property rights from its owner and restores those rights to the citizen who had previously conveyed them, goes too far and, therefore, requires payment of compensation, where the citizen had ignored both actual and constructive notice that the owner's lawful mining operation would cause subsidence to his house and chose to remain on the property.
4. Whether the federal mine inspectors' regulatory action has effectively destroyed a state-recognized estate in land, for which petitioners are entitled to compensation.
5. Whether the decision of the court below that no compensable taking had occurred conflicts with applicable decisions of this Court.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear in the caption of the case.

Neither corporate petitioner has a parent or subsidiary company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners M & J Coal Company and Monongah Development Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit in this case is reported at 47 Fed.3d. 1148 (1995). The opinion of the United States Court of Federal Claims is reported at 30 F.Cl.360 (1994).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows: "...nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

ACQUISITION OF COAL AND RIGHT TO SUBSIDE

During the years from about 1905 - 1920 the owners of real estate comprising more than seven hundred acres situated in the mountainous terrain of Lincoln District, Marion County, West Virginia were approached by parties interested in mining the Pittsburgh seam of coal lying beneath their surface tracts. For valuable consideration paid to them by the coal companies, the surface owners conveyed the Pittsburgh coal and mining rights.

By virtue of various deeds severing the Pittsburgh coal, and the right to mine that coal, from the real estate overlying the mineral, Consolidation Coal Company ("Consol") eventually acquired all of said coal and mining rights prior to 1966.

Because the removal of the Pittsburgh seam would create voids having a height of as much as eight feet, and because of the likelihood that some of the overlying strata would collapse into those voids, the severance deeds included the right to mine the coal "without being liable for any injury or damage done to the overlying surface, or to anything therein or thereon." This right is commonly referred to as the "right to subside."

Prior to 1970, Consol conducted operations in the subject coal, which became known as the "Monongah mine," using a method known as room-and-pillar mining. This method, and the limitations inherent in the equipment employed at that time, required leaving in place approximately fifty to sixty percent of the coal. The remaining blocks and pillars served generally to support the overlying strata, although there was some subsidence which was evidenced by "sink holes" on the surface overlying the coal mine.

As a result of the strong demand for Pittsburgh coal, and because of advances made in mining equipment and technology, it became feasible after 1980 to return to the Monongah mine and extract the remaining blocks and pillars of coal. To that end, Charles Sorbello was approached by the owners of Monongah Development Company, Inc., a company which had acquired the remaining Pittsburgh coal and mining rights from Consol, with an offer to lease the same to him or his company.

PETITIONERS' INVESTMENT-BACKED EXPECTATIONS

Upon receiving the offer, Charles Sorbello contacted John Markovich, who had previous experience in conducting pillar extraction operations in the Pittsburgh seam, and asked him to evaluate the remaining tonnages and feasibility of the project.

John Markovich physically inspected the mine and made an estimate that approximately 75,000 to 100,000 tons of coal per year were recoverable, over a period from 1985 through 1989. This estimate was based on the assumption that the operator would have the right to subside certain surface structures and that, as to those public roads, utilities, streams, etc., required by law to be protected, the angle of critical deformation[1] would be fifteen degrees. Supporting these assumptions were the facts that (a) the tracts were then being mined under an assignable permit issued by the West Virginia Department of Energy, which permit called for a 15-degree draw angle; and (b) the operator had acquired, and therefore could convey, the mining rights, including the right to subside certain unprotected dwellings.

Based upon such projections, and after considering the amounts of money to be invested in obtaining the coal and mining rights, as well as in the equipment, engineering services

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[1] Sometimes referred to as the "draw angle," this is the angle between the vertical line at the pillar edge and the line connecting the panel edge and the edge of the movement, which angle defines the amount of coal to be left in place.

and other costs associated with obtaining a mining permit, and other operational costs, Sorbello purchased the corporate stock of Monongah Development Company and he and Markovich formed M & J Coal Company for the purpose of mining the coal.

In November and December, 1985, Monongah and M & J Coal made the required investment amounting to approximately $500,000.00, based upon the expectation of recovering approximately 400,000 tons of Pittsburgh coal from the mine, applied for the transfer of the West Virginia mining permit, and in December commenced mining operations. The first coal was removed and sold in December, 1985.

The operations were initially conducted under mining Permit No. UO-639, issued by the West Virginia Department of Natural Resources to Pittsburgh Coal Works, Inc., and assigned to M & J Coal in November, 1985.

ACTUAL AND CONSTRUCTIVE NOTICE TO RESIDENTS

Pittsburgh Coal Works, Inc., in accordance with prevailing state regulations, had given notice in 1983 and 1984 to the surface owners of the anticipated mining operations and possible subsidence, via certified mail, in which the following language was contained:

> "We anticipate to mine under your property . . . in a period of six (6) months from date, and continuing mining activities under your property until completion of mine.
>
> "Pittsburgh Coal Works, Inc. shall take such measures to prevent or control adverse surface effects, as shall be required by law and the mining rights granted by the former owners of your property.
>
> "**The mining rights on your property may permit subsidence and surface effects.**" (Emphasis added).

Prevailing West Virginia law recognized the right of a coal company to subside surface structures, including dwelling houses, where the surface owner or his predecessors in title had conveyed away such right and waived liability for damages. Please refer to opinions of the Circuit Court of Marion County, West Virginia, Appendix, pp. 39a - 48a, inclusive.

At all times material hereto, West Virginia laws regulating mining operations were entitled to primacy, and federal regulations in effect at all times did not require M & J to repair material structural damage to such dwelling houses. State law did require the coal operator to repair surface lands and restore them to their prior use.

On March 5, 1986, Carl Dingus, a surface owner, filed a complaint with the West Virginia Department of Energy, alleging that deep mine operations had caused cracks in his driveway and breaks in his water line. State inspectors investigated the complaint and found that the damage had been caused by underground mining under Permit No. UO-639.

On March 7, 1986, the state inspector issued a notice of violation based on subsidence damage and required the operator to "fill in or otherwise repair large surface cracks." Because the transfer of the mining permit to M & J Coal had not been completed as of that date, the violation was issued against Pittsburgh Coal Works, Inc., even though M & J was actually conducting the operations.

On March 21, 1986, state and federal inspectors conducted a joint inspection on the Dingus property. At that time, the state issued a notice of violation against M & J Coal for engaging in surface mining without first having obtained a permit from the commissioner. The violation required M & J to cease mining operations at that time. The notice was served on John Markovich on March 21, 1986.

During the course of the joint inspection, one of the state inspectors was approached by Joseph Tarley, a neighbor of Carl Dingus. Tarley complained of subsidence damage to his house.

On April 11, 1986, Dingus' neighbor, Joseph Tarley, sent a letter to Charles Sheets at the district office of OSM at

Morgantown, West Virginia, complaining of subsidence which caused damage to his "house and property." In the letter, Mr. Tarley referred to his "fear of future damage to my property and the safety of my family."

On April 14, 1986, OSM issued a ten-day notice to the West Virginia Department of Energy, advising that state regulatory authority of the complaint of Joseph Tarley.

STATE APPROVAL OF SUBSIDENCE CONTROL PLAN AND MINING OPERATIONS

On April 25, 1986, the West Virginia Department of Energy approved M & J's mine subsidence control plan and issued a mining permit, after determining that M & J was no longer in violation of any statute, rule or regulation. According to a conversation record dated 9:00 o'clock a.m., April 25, 1986, a state inspector, William Morgan, advised William Berthy, an OSM inspector, as follows:

> "Mr. Morgan said the subsidence control plan had been reviewed and the approval letter was being typed. The Attorney General's Office has determined, according to Mr. Morgan, that M & J Coal Company has the right to subside. The subsidence control plan states that they will protect the roads, streams and power poles. The company was authorized to commence mining by DOE on April 24, 1986, using the subsidence control plan in the original permit."

At 10:45 o'clock a.m., April 25, 1986, Mrs. Tarley called OSM and talked with Inspector Berthy, who advised her that M & J Coal had been authorized to commence mining by the West Virginia DOE, and that a new subsidence control plan had been approved as of that date.

At 1:00 o'clock p.m., April 25, 1986, Joseph Tarley called OSM and talked with Charles Sheets. According to Mr. Sheets,

Mr. Tarley said that his house "had subsided as a result of M & J Coal Company's mining activities" and the Tarleys "were in the process of moving out their belongings from the house."

FEDERAL REGULATORS' INTERVENTION

In the late afternoon of April 25, OSM officials Charles Sheets, Mike Superfesky and Bill Berthy went to the Fairmont (Marion County) office of the West Virginia Department of Energy, and from there went to the Joseph Tarley residence, arriving there at 4:20 p.m.

The OSM officials observed the Tarley family and their relatives and friends loading the Tarleys' household furniture and goods into a moving van.

Despite Joseph Tarley's expression of concern for his family's safety, as expressed by Mr. Tarley to OSM more than a month earlier, Mr. Superfesky apparently found it necessary to order the evacuation of the house.

OSM inspector Superfesky observed "a large crack (over 1-foot wide) in the front yard. This crack propagated through the house. The front foundation wall was pulled five inches from the basement floor slab in the rec room. The western foundation wall contained severe diagonal cracks 4-6 inches wide. There was a 6-inch wide crack in the concrete basement floor near the furnace. The front or north foundation wall was also buckled and the rear of the house was buckled. Mr. Tarley had to install wood block cribbing and steel jack posts in the rec room to prevent total collapse of the house."

Both Superfesky and Sheets spoke with Mike Nunan of the West Virginia Department of Energy, who stated that M & J Coal was in compliance with applicable state statutes, rules and regulations, and that the West Virginia DOE was not going to issue "any enforcement actions."

Both Sheets and Superfesky believed that, West Virginia law notwithstanding, "no one has the right to subside another person's house." OSM thereupon issued Cessation Order 86-11-433-01 against M & J "for a condition, practice, or viola-

tion creating an imminent danger to the health and safety of the public." This order was issued despite the legal status announced in State Inspector Morgan's letter.

The foregoing Cessation Order was issued notwithstanding that OSM's State Director, James Blankenship, interpreted the applicable statutes, rules and regulations as follows:

> "West Virginia's surface mining reclamation regulations at Section 7C.02(b) provides that each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence. Where an operator possesses the right to subside without liability to surface owners, the operator does not have to repair or restore damaged structures. Even though M & J Coal Company was mining without a permit at the time it subsided the Dingus house, the State has determined that the company possesses the right to subside without liability to the surface owners. The State has required M & J Coal Company to correct all surface disturbance, but homeowners in the area are responsible under State law to repair any structural damage. The State provisions are no less effective than the Federal requirements at 30 CFS 817.121(c)(2).

According to Superfesky, OSM's "main concern was that people would fall into the subsidence cracks or a distressed structure would collapse on an individual. The area affected is populated. There may be up to sixteen homes affected along with public roads, utilities, and a stream."

Upon the OSM inspectors' attempting to serve the Cessation Order, "Mr. Markovich and his father disagreed vehemently

with the cease order and with [their] professional judgment. [OSM officials] attempted to explain [their] position and the remedial measures necessary." Mr. Markovich refused to sign the C.O. and "refused to implement measures to prevent injury to the public."

As the result of the Cessation Order, M & J could not mine coal. The record in this case is devoid of any specific "remedial measures" that the company could take to avoid being shut down. Meanwhile, M & J was required to lay off its employees, and its ability to meet its obligations under coal supply contracts and loans was severely impaired. According to John Markovich, OSM was now "[holding] a gun to my head."

On April 28, 1986, OSM representatives met at the Tarley residence with officers of M & J Coal Company, its geological consultant and its attorney, as well as the commissioner and other officials of the West Virginia Department of Energy. Joseph Tarley, Carl Dingus and Toliver Miller, all residents of the immediate area, also attended the meeting. The purpose of the meeting was "to discuss remedial measures needed to abate Cessation Order No. 86-11-433-01."

According to OSM Inspector William Berthy and his supervisor, Charles Sheets, the remedial measures required by OSM as of the April 28 meeting were as follows:

> "On April 29, 1986, the company will start filling the subsidence cracks on Mr. Tarley and Mr. Dingus properties.
>
> "Gary Gardner had Mr. Tarley and Mr. Dingus sign DMM-12's, Special Land Use Forms, so the company could come on their property to fix the subsidence cracks.
>
> "A subsidence control plan needs to be updated to prevent harm to the public from occurring again. The subsidence control plan will be reviewed by the Office of Surface Mining and Department of Energy, Permit Section. Efforts will be coordinated

by Mike Superfesky of the Morgantown Area Office."

Between April 28 and 30, 1986, Gary Gardner, a surveyor and geological consultant for M & J, attempted to ascertain the specifics of OSM's requirement that M & J's "subsidence control plan needs to be updated to prevent harm to the public from occurring again." During that period, he initiated several telephone conversations with Superfesky. During the course of those discussions, Mr. Superfesky made it clear that OSM was requiring that, despite M & J's established right to subside private structures on the surface, dwelling houses were to be added as protected structures in the revised plan; additionally, the amount of coal required to be left in place beneath all protected structures was to be increased.

After making proposals which failed to satisfy OSM's requirement that additional coal be left in place beneath protected structures, Mr. Gardner, on April 30, 1986, presented a revised subsidence control plan which incorporated a 30-degree draw angle and added occupied dwellings to the classes of structures protected by leaving coal in place. Additional conditions imposed by OSM included changing the scale of the mine maps and assurances that the operator will restore all land surface "to the condition it was capable of supporting prior to mining and subsidence."

The revised subsidence control plan was "agreed to by all parties at 1:00 o'clock p.m. on April 30, 1986. Copies of the revised subsidence control plan were furnished to OSMRE. Cessation Order 86-11-433-01 was terminated at 1:00 o'clock p.m. on April 30, 1986."

QUANTITY AND VALUE OF THE COAL TAKEN

In requiring that dwelling houses be included as protected structures under the revised subsidence control plan, and by requiring that the angle of critical deformation be increased from 15 degrees to 30 degrees, M & J Coal Company and Monongah

Development Company were deprived of their respective rights in a minimum of 99,700 tons of Pittsburgh coal, or approximately 25% of the coal they had acquired, and which they had planned to mine, but which they were now being required to leave in the ground.

At the time OSM imposed the foregoing requirements, M & J Coal Company was receiving $25.00-$30.00 per ton for the Pittsburgh coal mined, removed and sold from the Monongah mine.

During the mining operations by M & J, which resumed on April 30, 1986 and continued until the closing of the mine in 1990, M & J Coal Company received as much as $30.00 per ton for the Pittsburgh coal mined, removed and sold from the Monongah mine.

Due to the type of mining technique employed in the Monongah mine, once the retreat mining was completed in an area of coal, the roof generally collapsed and there is no feasible way to return and recover blocks and pillars of coal left in place. The coal seam at that point no longer has any economically viable use. Such is now the case at the Monongah mine.

According to Joseph Siebart, C.P.A., OSM's requirement that the 99,700 tons be abandoned resulted in a foregone profit to M & J of $580,000.00, which amount represents the difference in fair market value of the interests of M & J and Monongah in the leased coal before the taking and the fair market value after the taking.

PROCEEDINGS BELOW

Petitioners filed their joint claim for compensation in the U.S. Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491. After extensive discovery the respective parties filed cross-motions for summary judgment. The Court of Federal Claims, Tidwell, J., denied petitioners' motion and granted that of the government.

Petitioners appealed to the United States Court of Appeals for the Federal Circuit, which sustained the lower court decision by judgment entered on February 15, 1995.

REASONS FOR GRANTING THE WRIT

SUMMARY

I. THE LOWER COURT'S HOLDING THAT M & J AND MONONGAH HAD FAILED TO ESTABLISH A COGNIZABLE PROPERTY RIGHT TO MINE PURSUANT TO A 15-DEGREE SUBSIDENCE CONTROL PLAN AND TO SUBSIDE PRIVATE DWELLINGS WAS CLEARLY ERRONEOUS.

II. THE ACTIONS OF THE AGENTS OF THE U.S. DEPARTMENT OF THE INTERIOR, IN REQUIRING M & J TO LEAVE IN THE GROUND COAL WHICH THE COMPANY OWNED AND WHICH WAS OTHERWISE COMMERCIALLY AND ECONOMICALLY FEASIBLE TO MINE CONSTITUTED A TAKING UNDER THE FIFTH AMENDMENT.

A. M & J and Monongah Had Valid Property Interests Which Were Subjected to a Regulatory Taking.

B. The Taking of the Property Interests of M & J and Monongah Is Not Subject to Any Recognized Exception to The Requirement That Just Compensation Be Paid.

C. The Conclusion That a Compensable Taking Has Occurred is Not Altered by the Decision in Keystone Coal Association v. DeBenedictis.

III. THE COURT BELOW FAILED PROPERLY TO WEIGH PRIVATE AND PUBLIC PROPERTY INTERESTS WHEN IT SUSTAINED THIS REGULATORY TAKING WITHOUT COMPENSATION, AND ITS HOLDING CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

I. THE LOWER COURT'S HOLDING THAT M & J AND MONONGAH HAD FAILED TO ESTABLISH A COGNIZABLE PROPERTY RIGHT TO MINE PURSUANT TO A 15-DEGREE SUBSIDENCE CONTROL PLAN AND TO SUBSIDE PRIVATE DWELLINGS WAS CLEARLY ERRONEOUS.

As expressly set forth in the judgment below, the taking claim of M & J and Monongah hinged on the establishment of a cognizable property right to mine pursuant to a 15-degree subsidence control plan and to subside private dwellings. The court held that, because M & J and Monongah failed to establish either of those rights, their takings claim must fail. Such a conclusion necessarily disregards material facts which the court itself found to have been established: namely, the fact that M & J acquired a state-approved mining permit which specified a 15-degree subsidence control plan, and the fact that M & J had acquired the right to subside the private dwellings of owners whose predecessors in title had conveyed away that right. Neither fact was seriously controverted by the government in the courts below, and we respectfully submit that the lower court's conclusion that plaintiffs failed to establish either of such facts was clearly erroneous.

Applying the lower court's own rationale, if M & J and Monongah were to establish a cognizable property right to mine pursuant to a 15-degree subsidence control plan and to subside private dwellings, and if the government, by regulation, took their coal after those rights were established, M & J and Monongah would be entitled to compensation. This, we respectfully submit, is precisely what happened, and upon these facts, the lower court's judgment that no regulatory taking occurred was incorrect as a matter of law.

II. THE ACTIONS OF THE AGENTS OF THE U.S. DEPARTMENT OF THE INTERIOR, IN REQUIRING M & J TO LEAVE IN THE GROUND COAL WHICH WAS OTHERWISE COMMERCIALLY AND ECONOMI-

CALLY FEASIBLE TO MINE CONSTITUTED A TAKING UNDER THE FIFTH AMENDMENT.

A. M & J and Monongah Had Valid Property Interests Which Were Subjected to a Regulatory Taking

The case at bar cannot be distinguished in any meaningful or substantive way from the case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), which has for more than seven decades been the cornerstone of "regulatory takings" jurisprudence. A brief description of the facts in Pennsylvania Coal should make it clear that there is no constitutionally significant basis for distinguishing that case from the case at bar.

Pennsylvania Coal Company executed a deed in 1878 conveying title to real estate in Pittston, Pennsylvania. The deed expressly reserved "all the coal and other minerals under, in or upon said lot of land. And also the right and privilege of mining and removing all the coal . . . ." Mahon v. Pennsylvania Coal Co., 274 Pa. 489 (1921). For several years prior to 1921, the Pennsylvania Coal Company had been engaged in the mining and removing of the anthracite coal underlying the Mahon property. In September, 1921, the company sent the Mahons a notice that deep mining operations beneath their house would commence soon.

The Mahons then filed an action in state court seeking an injunction against further mining under their house. They argued that the mining was prohibited by the Kohler Act, which had been passed by the Pennsylvania legislature several months earlier. That legislation prohibited mining "so as to cause collapse" of any "dwelling or other structure used as a human habitation. . . ." The coal company responded by claiming, inter alia, that the statute effected an uncompensated taking of its property and constituted a substantial impairment of its contract with the Mahons, in violation of the U. S. Constitution. The trial court agreed with the coal company and refused to issue an injunction.

The Pennsylvania Supreme Court reversed. That court emphasized the importance of the state's interest in protecting "the lives and safety of large numbers of the people of the Commonwealth" and argued that this justification "properly warrant[ed] the exercise of the police power. . . ." 274 Pa. 497. In further support of its holding, the state court reasoned that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . ." Id.

The dissenting justice examined the practical effect of the Kohler Act, stating that "it is just as certain as anything can be that one-fourth to one-third of the coal must remain in place for surface support, for the coal owner, under the Kohler Act, will scarcely provide artificial support, by concrete or stone pillars, or otherwise, at a cost greatly exceeding the value of the coal." Id. at 516. Thus, he argued, the statute simply "confiscates a well-defined property right." Id. at 517. Alternatively, he argued that the Act takes the support estate "from defendant and vests it in plaintiff without compensation." Id. at 510.

The opinion of this Court in Pennsylvania Coal essentially adopted the reasoning of the dissenting state court justice. Writing for the majority, Justice Holmes perceived the following dual effect of the government's action on property rights: by compelling the coal operator to support surface structures, the government "purports to abolish what is recognized in Pennsylvania as an estate in land -- a very valuable estate," 260 U. S. at 414; and, to comply with the government's actions, the operator would either have to abandon the support coal or substitute some other support material, making it "commercially impracticable to mine certain coal," which "has very nearly the same effect for constitutional purposes as appropriating or destroying it." Even accepting the claim of the surface owners that the government's action was based "upon the conviction that an exigency existed that would warrant it," Justice Holmes concluded that the magnitude of the state's interest was not relevant to the issue of whether the state could "take" the coal company's property without providing any compensation for it. Id.

A striking similarity between the case at bar and Pennsylvania Coal is the fact that in each case the governmental action had the effect of requiring the coal operators to leave approximately twenty-five percent of their coal in the ground. 274 Pa. at 511, 516.

According to Justice Holmes, "for practical purposes, the right to coal consists in the right to mine it. . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the [government] does." 260 U. S. at 414-415.

In reaching the decision overturning the ruling of the Pennsylvania Supreme Court, Justice Holmes relied upon the proposition that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation," and that "[t]he general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415.

It should be apparent that, when viewed in the context of Pennsylvania Coal, the actions of the OSM inspectors in requiring that M & J Coal leave in place the various blocks of coal, in reality, amounted to the confiscation of a well-defined property right under the purported justification of the exercise of their police powers or, in the alternative, they were taking the support estate from M & J and Monongah and returning it to the surface owners without any compensation to the companies which had paid for that estate.

Viewed in the most reasonable light, the actions of the OSM inspectors amounted to the conferring of economic benefits on the Dingus and Tarley families alone, at the expense of petitioners, and it cannot be said that their actions substantially advanced a legitimate public interest. These two surface owners or their predecessors had conveyed away, for valuable consideration, a property right having indisputable value; the prop-

erty right was well-established under West Virginia law; M & J had acquired the right to subside and was exercising that right; prior notice, both actual and constructive, of the intent to exercise that right had been given to the surface owners; and the Dingus and Tarley families had ignored the warnings and obvious physical evidence of subsidence, choosing to remain in their houses right up to the point of crisis on April 25, 1986.

The interests of M & J and Monongah in particular coal deposits have been completely destroyed. By requiring that defined blocks of coal remain in the ground, the government agents have extinguished any interest one might want to acquire in that coal, since, as Justice Holmes stated, "the right to coal consists in the right to mine it." Pennsylvania Coal, supra, at 414.

B. The Taking of the Property Interests of M & J and Monongah Is Not Subject to Any Recognized Exception to The Requirement That Just Compensation Be Paid

Although the proscription of the Takings Clause is written in absolute terms, its application is nonetheless limited by certain long-standing doctrines. Primary among the recognized limitations on the Takings Clause is the police power.

The police power provides only a limitation upon the Takings Clause, not an abrogation. As such, this "limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal, supra., p. 413. Despite the limits which may prevail upon typical exercise, however, two types of police power conduct have been regarded as unqualified exceptions upon the Fifth Amendment requirement of just compensation. Under these exceptions, property interests could be destroyed without compensable takings having occurred.

The parameters of the police power exceptions to the Takings Clause were explored in the dissenting opinion in Penn Central Transp. Co. v. New York, 438 U.S. 104, 138-153. The two exceptions identified in that dissent are (1) the nuisance

exception, and (2) average reciprocity of advantage. Id. See also Pennsylvania Coal, 260 U.S. 393, 413-416.

The parameters of the nuisance exception do not encompass private nuisances, as only public nuisances properly are subject to police power control. Pennsylvania Coal, 260 U.S. at 413; Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2896-2897 (1992). Private nuisances must be addressed by private legal remedies. Consequently, the threshold question whenever the state attempts to justify a property restriction on the grounds of abatement of nuisance is whether the restricted use constitutes a public, not merely a private, nuisance.

This distinction was addressed in a recent West Virginia case. Duff v. Morgantown Energy Associates, 421 S.E.2d 253 (1992). The Duff Court stated that "[a] public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons. The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only." 421 S.E.2d at 257, quoting Mark v. Mountain Fork Lumber Co., 127 W. Va. 586, 595-96, 34 S.E.2d 348, 354 (1945).

The second exception to the Takings Clause identified in the synthesis stated in the Penn Central dissent is the doctrine of average reciprocity of advantage. Penn Central, 438 U.S. at 147. See also Pennsylvania Coal, 260 U.S. at 415. Exercises of the police power which come within the scope of this exception are those which impose restriction upon "a broad cross section of land" so that the burden of the regulatory scheme is shared rather evenly by a large section of the public. Penn Central, 438 U.S. at 147-148. A classic example of state action of this genre is zoning, which consistently escapes the finding that a taking has occurred on the theory that, while value is lost by the prohibition of certain uses, overall property values are enhanced.

More recently, this Court revisited the exceptions provided by the noxious uses and reciprocity doctrines. In Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 491 (1987),

this Court reconceptualized these theories, not as distinct doctrines, but as alternative, though consistent, explanations for the same outcomes. In so doing, the Court struck down the historic understanding of the doctrines as distinct explanations for different types of state action. Later, these theories were recharacterized as merely two ways of saying the same thing. Lucas, 112 S.Ct. 2886.

In Lucas the Court has defined the type of governmental regulatory action which will escape the finding that a taking has occurred. The question, according to the Lucas opinion, is not whether the regulatory action abates a public nuisance or confers a public benefit, but whether the "proscribed use interests were not part of [the owner's] title to begin with." Id. at 2899.

Under the prevailing formulation of the takings exception, confiscatory regulations, i.e., those prohibiting all economically beneficial use of property,

> cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id. at 2900 (footnote omitted). Therefore, where the regulation proscribes a use permitted under previous understandings, the payment of compensation cannot be avoided.

The Lucas rule, when applied to the facts of the case at bar, demands that a compensable taking of the coal of M & J and

Monongah be acknowledged. The Dingus and Tarley families could not have achieved the result challenged here, which is tantamount to an injunction against M & J, through resort to the State's remedies for private nuisance. An action for private nuisance requires injury to a property right or privilege held by the plaintiff. Duff, 421 S.E.2d at 256. In this case, however, the right to subjacent support of the dwellings had been alienated in prior deeds.

Nor can the action of the OSM be said to mirror the State's power to abate a public nuisance. As stated previously, a public nuisance is a noxious use which is harmful to the public generally, not to an individual or limited group of individuals. That the subsidence of the Dingus and Tarley residences was not a proper subject for the exercise of the State's power as regards public nuisances is evidenced by the refusal of the appropriate state authorities to intervene.

Because the exception to the finding of a taking cannot be made to apply to the circumstances present in the instant case, it must be concluded that the regulatory confiscation of the coal of M & J and Monongah was a taking within the meaning of the Fifth Amendment.

C. The Conclusion That a Compensable Taking Has Occurred is Not Altered by the Decision in Keystone Coal Association v. DeBenedictis

Pennsylvania Coal has never been overruled or abandoned and, we submit, provides the proper legal framework for deciding this case. As stated in the dissent in Keystone, 480 U.S. at 502, the precedential value of Pennsylvania Coal should not be readily dismissed. The lower court found that Keystone is dispositive of the case at bar. Such finding ignores the salient points upon which Keystone is clearly distinguishable from this case.

The Keystone case involved a constitutional test of a Pennsylvania statute which was unquestionably similar to that held unconstitutional in Pennsylvania Coal. In its decision, the Key-

stone Court held that Pennsylvania Coal could be distinguished upon several "particular facts," 480 U.S. at 474. Two of these facts are dispositive of the instant case.

As in the present case, Pennsylvania Coal involved an "as applied" challenge to the statute in question. Keystone, by contrast, was a facial challenge to the mining statute, and its holding was limited to the facial validity of the statute as regards the law of regulatory takings. The Court in Keystone specifically recognized that an "as applied" challenge to the statute remained unanswered by its decision. Id. at 494, n. 23. Consequently, the Keystone holding is inapposite in the present analysis.

Secondly, at the time of the Pennsylvania Coal decision, the property law of the state of Pennsylvania recognized the support estate as a separate and distinct estate in property. By the time of the Keystone challenge, however, Pennsylvania's highest court had ruled that the support estate was merely incidental to the ownership of either the surface or the minerals. In West Virginia, the support estate remains a distinct property interest. See, e.g., opinions of Circuit Court of Marion County, West Virginia, App. 39a-48a, inclusive.

In sum, the facts which led the Keystone Court to reach a decision which appears contrary to the holding of Pennsylvania Coal are the same facts which prevented the Court from overruling its prior decision, and are the same facts which favor M & J and Monongah in the case at bar.

CONCLUSION

The Court below failed properly to weigh private and public property interests when it sustained this regulatory taking without compensation, and its holding conflicts with applicable decisions of this Court, most notably Pennsylvania Coal, supra. The result, if allowed to stand, is an unfortunate aberration in the relationship between legitimate exercise of police power and the private interests of citizens. For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and

petitioners should be allowed to file their brief and to articulate in the fullest possible terms why the taking which occurred was compensable, to the end that the holding below should be reversed and this case remanded to the Court of Federal Claims to determine the amount of compensation to which petitioners are entitled.

Respectfully submitted,

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Counsel for Petitioners
May 10, 1995

APPENDIX

Judgment of the United States Court of Appeals for the Federal Circuit 2a

Opinion of the United States Court of Appeals for the Federal Circuit 3a

Judgment of the United States Court of Federal Claims ... 17a

Opinion of the United States Court of Federal Claims 18a

Opinion of the Circuit Court of Marion County, West Virginia, Fox, J. 39a

Opinion of the Circuit Court of Marion County, West Virginia, Merrifield, J. 43a

United States Court of Appeals for the Federal Circuit

94-5081

M & J COAL COMPANY and
MONONGAH DEVELOPMENT COMPANY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgement

ON APPEAL from the United States Court of Federal Claims
in CASE NO(S). 92-266L
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED:

Affirmed

FEB 15 1995 — *ENTERED BY ORDER OF THE COURT*
DATED — /s/ Francis X. Gindhart, Clerk

Issued as Mandate: April 10, 1995
COSTS:
Printing.....$488.00
Total $488.00

United States Court of Appeals for the Federal Circuit

94-5081

M & J COAL COMPANY and
MONONGAH DEVELOPMENT COMPANY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Edgar F. Heiskell, III, of Charlestown, West Virginia, argued for plaintiffs-appellants.

Jeffrey P. Kehne, Attorney, Environment & Natural Resources Division, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were Lois J. Schiffer, Acting Assistant Attorney General, James E. Brookshire, Gregory D. Page and Albert M. Ferlo, Jr. Also on the brief were Thomas A. Bovard, Jean R. Goldfarb and John Jasper, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., of counsel.

Appealed from: U.S. Court of Federal Claims
Judge Tidwell, III

United States Court of Appeals for the Federal Circuit

94-5081

M & J COAL COMPANY and
MONONGAH DEVELOPMENT COMPANY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED February 15, 1995

Before MAYER, Circuit Judge, BENNETT, Senior Circuit Judge, and LOURIE, Circuit Judge.

LOURIE, Circuit Judge.

M & J Coal Company and Monongah Development Company (collectively "M & J") appeal from a judgment of the United States Court of Federal Claims granting the government's motion for summary judgment. M & J Coal Co. v. United States, 30 Fed. Cl. 360 (1994). Because M & J failed to establish that the government's action in regulating its coal mining operations effected a taking of private property without compensation in violation of the Fifth Amendment to the United States Constitution, we affirm.

BACKGROUND

This regulatory takings case involves the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which regulates mining practices and techniques. See 30 U.S.C. §§ 1201-1328 (1988). SMCRA authorizes the Department of the Interior to prohibit mining operations that endanger public health and safety or harm the environment. In relevant part, SMCRA provides as follows:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this [Act] or any permit condition required by this [Act], which condition, practice or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. . . . Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Sec-

> retary deems necessary to abate the imminent danger or the significant environmental harm.

30 U.S.C. § 1271 (1988).

In this case, we address the question whether the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"), acting pursuant to its authority under SMCRA, may regulate coal operations that are endangering the public health or safety without effecting a taking of property requiring the payment of just compensation under the Fifth Amendment. A complete statement of the undisputed facts is reported in the opinion of the Court of Federal Claims. To the extent necessary, we repeat those facts below.

Between 1904 and 1920, owners of approximately seven hundred acres of land in the mountainous region of Lincoln District, Marion County, West Virginia, sold to various coal companies for valuable consideration the right to mine the Pittsburgh seam of coal beneath the surface of their property. The owners sold these rights through various mineral severance deeds, some of which included the right to mine "without being liable for any injury or damage done to the overlying surface, or to anything therein or thereon."

By 1966, the Consolidated Coal Company, Inc. ("Consolidated") had acquired all the rights to mine the Pittsburgh seam from these coal companies. Consolidated mined fifty to sixty percent of the Pittsburgh seam coal using a technique known as "room-and-pillar" mining, whereby pillars of coal were left standing to support the surface above the mine. Subsequently, Pittsburgh Coal Works, Inc. ("PCW") acquired the right to mine the coal and pillars left by Consolidated.

In July 1981, the Monongah Development Company acquired from PCW the right to extract the coal that the earlier operators had left in place to support the roof of a mine known as the "Monongah mine." Two independent businessmen, Charles Sorbello and John Markovich, estimated that, by using

newly developed mining techniques, they could remove approximately 75,000 to 100,000 tons of coal per year between 1985 and 1989 from the Monongah mine. In making their estimate, they assumed that they could subside[1] the surface above the mine on the properties for which the original owners had conveyed that right. For those surfaces required to be protected by existing state law, they planned to leave coal pillars in place having a 15-degree angle of draw in order to support the surface.[2] Sorbello then purchased all the corporate stock of the Monongah Development Company. In late 1985, Sorbello and Markovich formed the M & J Coal Company for the purposes of mining and selling the coal. M & J Coal invested approximately $500,000, based on the expectation of recovering $400,000 per year from its mining and selling operations.

M & J began mining without the permit required by West Virginia law. Although it had applied for a transfer of the permit earlier held by PCW, the transfer did not take effect until March 28, 1986. M & J planned to adopt PCW's subsidence control plan, which called for a 15-degree angle of draw under the structures required to be protected by state law. However, M & J did not submit its plan to the state of West Virginia until April 14, 1986, and the state did not approve the plan until April 25, 1986.

In March 1986, two neighboring residents complained to the West Virginia Department of Energy (WVDOE) that M & J's mining operations had damaged their properties. Following a joint investigation by state and federal inspectors, the state issued a Notice of Violation (NOV) against M

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[1] "Subsidence" is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal.

[2] A 15-degree angle of draw requires that a mining company leave a cone-like pillar of coal delineated by dropping a line from the roof of the mine 15 feet away from the structure on all sides, and then extending the bottom of that line to the floor of the mine at a 15-degree angle from the vertical. A larger angle of draw means that more coal must be left in place.

& J for mining without a permit and without notifying all affected surface owners of the mining and the possibility of subsidence.[3]

One resident contacted OSM to complain of the subsidence and described extensive damage to his property. The resident reported that the needle on his gas meter was "spinning wildly," that a section of the gas line adjacent to the gas meter had been severed, and that his water line to the public water supply was broken. In addition, the electric wires leading to his house were stretched "as tight as a fiddle string." The resident expressed concern about the possibility of a gas explosion and its effects on the safety of his family and neighbors. Mining operations had caused large cracks to develop in the surface of his property and a neighbor's dog had fallen into a crack to its death. The resident believed that neighborhood children were at risk of similar harm.

OSM officials visited the scene and consulted with the WVDOE, which replied that M & J was in compliance with all applicable state statutes, rules, and regulations, and that the state would not take any enforcement action against M & J. Nevertheless, OSM believed that the public was at risk of injury from large cracks in the ground, collapsing structures, and breaks in gas, water, and electrical lines. Thus, exercising its authority under SMCRA, OSM issued a cessation order against M & J "for a condition, practice, or violation creating an imminent danger to the health and safety of the public." The order required that M & J protect the public from surface cracks, re-

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[3] M & J had relied on notifications that PCW had given surface owners in 1983 and 1984. The notifications contained the following language:

We anticipate to mine under your property . . . in a period of six (6) months from date, and continuing mining activities under your property until completion of mine.

Pittsburgh Coal Works, Inc. shall take such measures to prevent or control adverse surface effects, as shall be required by law and the mining rights granted by the former owners of your property.

The mining rights on your property may permit subsidence and surface effects.

store the subsided land's pre-subsidence capacity to support structures and previous uses, and mine pursuant to a revised subsidence control plan. OSM approved a plan requiring a greater angle of draw under the protected structures and protection of single family dwellings.

M & J sought administrative review of OSM's order. See 30 U.S.C. § 1275(a)(1) (1988). In June 1988, the Department of the Interior's Office of Hearings and Appeals (OHA) upheld OSM's action as a valid exercise of its authority pursuant to SMCRA on the ground that M & J's mining activities had created an imminent danger to the health or safety of the public. The OHA noted that OSM would have been "grossly remiss" in its enforcement role had it not ordered cessation of M & J's mining operations. M & J Coal Co. v. OSM, Docket No. CH 6-15-R (1988).

M & J appealed to the Department of the Interior's appellate tribunal, the Interior Board of Land Appeals (IBLA), which affirmed the OHA. The IBLA rejected M & J's claim that its mining had not caused the subsidence and found that the subsidence "present[ed] a graphic picture of an imminent danger situation." M & J Coal Co. v. OSM, 115 IBLA 8, 23 (1990). M & J did not appeal from the decision of the IBLA.

Despite the new subsidence control plan, M & J's mining operations continued to cause damage in the region. During the next four years, cracks appeared in other residents' properties, the town of Worthington's water tank subsided, and a section of Route 218[4] subsided. The damage necessitated the excavation of a gas line and the repair of electric lines adjacent to Route 218. Worthington's mayor later testified at trial that she and an independent engineering consultant were concerned that the damage would impair the town water tank's stability. The mayor testified that loss of the water tank "would be a danger-

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[4] Route 218 was used regularly by commuters, businesses, school buses and state and municipal workers, including police, firefighters, and emergency workers. On average, 4,500 vehicles traveled on Route 218 each day.

ous situation because it would discontinue water service for general and emergency purposes, including fire fighting and health exigencies." The government adduced testimony, unrebutted by M & J, that this damage was caused by M & J's mining.

After completing its mining operations, M & J filed suit in the Court of Federal Claims alleging that OSM's enforcement action, which had required M & J to increase the draw angle under protected structures and to protect single family dwellings, deprived it of 99,700 tons of coal it otherwise could have mined, resulting in $580,000.00 in lost profits.[5] The parties stipulated to the material facts and cross-moved for summary judgment.

The court determined that M & J's takings claim depended upon whether it could establish a cognizable property right to mine pursuant to a 15-degree subsidence control plan and a right to subside private dwellings. The court denied M & J's claim because M & J failed to establish that it possessed either of those rights. The court ruled that M & J's reasonable expectations concerning its rights were limited by SMCRA's preexisting prohibition on mining practices that endanger the public health and safety and that the validity of OSM's actions had been conclusively determined by the prior administrative proceedings, which M & J had failed to challenge. M & J now appeals.

DISCUSSION

Whether the Court of Federal Claims properly granted summary judgment is "a question of law subject to complete and independent review" by this court. Tabb Lakes, Ltd. v. United

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[5] On appeal, M & J claims that the lost coal amounted to 100,700 tons, entitling it to an estimated foregone profit of $625,119.00 and $380,380.62 in interest. From late 1985 to early 1990, M & J mined more than 270,000 tons of coal from the Monongah mine and, despite having to repair some of the damage it caused, M & J ultimately profited from its mining operations to the extent of $692,086.41.

States, 10 F.3d 796, 799 (Fed. Cir. 1993) (citation omitted). Thus, we review the record de novo to determine whether any genuine issue of material fact exists, and if not, whether the movant is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(c). The parties do not disagree on any issue of material fact in this case and we conclude that the court did not err in ruling that the government was entitled to judgment as a matter of law.

Invoking this court's recent decision in Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994),[6] M & J argues that it had acquired, by means of a state permit, the right to mine pursuant to its 15-degree plan and, under state property law, the right to subside the private dwellings of owners whose predecessors in title had conveyed away that right. Thus, M & J alleges, OSM's requirement that M & J revise its coal mining operations constituted a taking of two categories of coal deposits: (1) deposits under protected surfaces required to be left in place because of the change to a greater than 15-degree angle of draw, and (2) coal under occupied structures that M & J claims it had the right to subside without limitation or liability. We do not agree.

The Fifth Amendment's guarantee "nor shall private property be taken for public use, without just compensation" is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). However, property use may be regulated without a compensable taking occurring. See Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). Where to draw the line is not always an

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[6] In Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), we examined the effect of the Supreme Court's decision in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), on a case decided by the Court of Federal Claims before that opinion issued. 28 F.3d at 1173.

easy task, but the Supreme Court has stated that if regulation goes "too far" it will constitute a compensable taking. Id. at 415. Whether the regulation of property entitling a property owner to compensation has occurred depends upon the particular circumstances of the case. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). To determine whether a governmental regulation of property has gone so far as to effect a taking. courts have engaged in an "essentially ad hoc, factual inquiry considering such factors as the economic impact of the regulation on the claimant[,] the extent to which the regulation has interfered with distinct investment-backed expectations [. and] the character of the governmental action." Id.; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, (1992), the Supreme Court explained that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by "'existing rules or understandings that stem from an independent source such as state law' [which] define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments." Lucas, 112 S. Ct. at 2901. Such rules and understandings may also stem from federal law. See id. at 2900 (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (interests of riparian owner in the submerged lands bordering on a public navigable water held subject to government's navigational servitude)). Thus, even when a governmental land use regulation deprives a claimant of all economically beneficial use of his property, the government may avoid compensation if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas, 112 S. Ct. at 2899; cf. Penn Central, 438 U.S. at 124-25 ("[T]he Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes.") (listing cases).

While Lucas involved an alleged "total taking," one in which the land owner was deprived of "all economically beneficial use" of his land, which is not true in the present case, the Lucas formulation is useful for analyzing takings claims involving land use restrictions even when deprivation is not complete. Specifically, in analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property.

Thus, we agree with the Court of Federal Claims that precedent indicates a "two-tiered" approach in analyzing a takings claim involving governmental action that results in land use restriction. First, a court should inquire into the nature of the land owner's estate to determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with, i.e., whether the land use interest was a "stick in the bundle of property rights" acquired by the owner. Lucas, 112 S. Ct. at 2899. Second, if the claimant can establish the existence of such an interest, the court must then determine whether the governmental action at issue constituted a compensable taking of that "stick." In making the second determination, the court must consider such factors as the character of the governmental action, the economic impact of the action on the claimant, and the extent to which the action has interfered with the claimant's distinct investment backed expectations. Penn Central, 438 U.S. at 124. Accordingly, before examining the extent of M & J's alleged property deprivation, the content of, and the government's power over, the "bundle of rights" acquired by M & J must be examined to determine whether the proscribed use was part of M & J's "property" within the meaning of the Fifth Amendment. In this case, M & J never acquired the right to mine in such a way as to endanger the public health and safety, and we need not make the second determination.

M & J's acquisition of rights by deed did not give it the right to mine in such a way as to endanger the public health and safety. Substantial precedent supports this conclusion. In a simi-

lar case involving state regulations requiring coal miners, inter alia, to leave 50% of the coal beneath dwellings in place as a means of providing surface support, the Supreme Court stated: "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the [government] asserts its power to enforce it." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987) (citations omitted). The Court noted that, "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the [government] has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." Id. at 491 n.20; see also Lucas, 112 S. Ct. at 2897 (where health, safety, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition) (quoting Penn Central, 438 U.S. at 125). Thus, in accordance with settled precedent, M & J could not have acquired under its deed of title the right to cause damage or a substantial risk of damage to the public health or safety.

The fact that M & J had a state permit to mine is also not controlling. The Secretary of the Interior possesses the right to issue federal cessation orders in cases of imminent danger to the health or safety of the public. See 30 U.S.C. § 1271. Thus, at the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM.

It is incontestable that OSM's actions were legitimate exercises under SMCRA to prevent harm to the public health and safety. The IBLA determined as much, specifically finding that OSM's actions were necessary to protect the public health and safety and that M & J's operations were posing a threat, not only to particular residents, but to the public in general. M & J

chose not to appeal the IBLA's determination. The Court of Federal Claims noted that M & J had chosen not to challenge the validity of OSM's enforcement actions by way of a district court action, see 5 U.S.C. § 702. Neither the Court of Federal Claims nor this court may entertain a collateral challenge to the validity of OSM's actions. See Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 898-99 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987).

M & J further argues that Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), mandates a holding in its favor. In Mahon, an owner of land containing coal deposits deeded away the surface of the land, while reserving the right to mine coal beneath the surface. According to the deed, the grantees waived any claim to damages that might arise from the mining, which waiver was valid under state law. A later-enacted state statute prohibited mining in such a way as to cause subsidence of dwellings.

The Mahon Court determined that the statutory prohibition against mining went "too far" because it completely diminished the value of the property and because the damage sought to be prevented by the statute was that to a single private house, which was not "common or public" and was "not justified as a protection of personal safety." 260 U.S. at 413-14. Cf. Keystone, 470 U.S. at 485 (state regulation requiring 50% of coal pillar to remain in place under dwellings did not constitute a taking; state had acted to "arrest what it perceive[d] to be a significant threat to the common welfare").

Relying upon Mahon, M & J alleges that OSM used SMCRA as a pretext to impermissibly assist two specific residents, who allegedly possessed no rights to surface support, at the expense of M & J.[7] Unlike Mahon, however, the present case does not involve merely a balancing of the private interests of surface owners against the private economic interest of

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[7] The two residents who had complained in March 1986 obtained no unique benefit by OSM's actions; however, as M & J had already completed its mining operations near their homes, OSM did not require M & J to compensate those residents or to repair their homes.

a coal company. Cf. Keystone, 470 U.S. at 485. It involves the much broader interests of public health and safety. That certain individuals or their predecessors may have unwisely deeded away their rights to surface support cannot estop OSM from exercising its authority to abate an imminent danger to the public health or safety. See id. at 488. Nor may a state mining permit compromise the right of the federal government under SMCRA to ensure that the public is free from imminent danger from mining. Despite M & J's focus on the fact that OSM's actions may have benefited individual residents, OSM's actions were taken to insure that M & J's use of its property did not injure the community at large. Justice and fairness do not require that the community at large bear the "burden" of M & J's inability to mine in a manner that is safe to the public. See Penn Central, 438 U.S. at 124; Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) ("The power . . . of prohibiting such use by individuals of their property as will be prejudicial to [health or safety] is not . . . burdened with the condition that the [government] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.").

An "antecedent" inquiry into the property use interests acquired by M & J thus reveals that M & J never acquired the right to mine in such a way as to endanger the public health and safety. OSM's action to prevent M & J from doing so did not interfere with M & J's property use interests.

CONCLUSION

Because M & J failed to establish that OSM's actions effected a taking of private property for purposes of the Fifth Amendment, the Court of Federal Claims' grant of the government's motion for summary judgment is

AFFIRMED.

In the United States Court of Federal Claims

No. 92-266L

M & J COAL COMPANY AND MONONGAH DEVELOPMENT COMPANY,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's order of January 28, 1994, granting defendant's motion for summary judgment, and denying plaintiff's cross motion,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

David A. Lampen
Clerk of Court

January 31, 1994

By: /s/

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re-number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 92-266L
(FILED: January 28, 1994)

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M & J COAL COMPANY and MONONGAH DEVELOPMENT COMPANY

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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Takings Claim; Surface Mining Control and Reclamation Act of 1977; Cessation of Mining Order; Limitation on Quantity of Coal Mined; Bundle of Property Rights Owned by Owners of Mine; Authority of Government to Prohibit Actions that Endanger Public Health and Safety.

Edward F. Heiskell, III, Morgantown, WV, for plaintiffs.
Gregory D. Page, Washington, D.C., for defendant.

ORDER

TIDWELL, Judge:

This case is before the court on the parties' cross motions for summary judgment pursuant to RCFC 56. For the reasons set forth below the court grants defendant's motion and denies plaintiffs' motion.

FACTS

I. Background

The seeds of this dispute were planted in the early part of this century, when the owners of approximately seven hundred acres of real estate situated in the mountainous terrain of Lincoln District, Marion County, West Virginia began selling mining rights to various coal companies. Between 1904 and 1920 those owners, through various mineral severance deeds, sold for valuable consideration the right to mine the Pittsburgh seam of coal, which lay beneath the surface strata of their property. Included in the severance deeds was the right to mine "without being liable for any injury or damage done to the overlying surface, or to anything therein or thereon."

Plaintiffs in this action were owners of mining rights to the Pittsburgh seam. Plaintiffs acquired their rights after the Pittsburgh seam had been previously and successively mined by two coal companies: the Consolidated Coal Company, Inc. (Consol), and Pittsburgh Coal Works, Inc. (PCW). By 1966, Consol had acquired all the rights to mine the Pittsburgh seam from the various coal companies that had purchased the original severance deeds. Sometime before 1970, Consol mined fifty to sixty percent of the coal contained in the Pittsburgh seam using a technique referred to as room-and-pillar mining. In turn, PCW mined coal and the coal pillars that Consol left in place.

After 1980, because of advances in mining techniques, it became possible to remove more coal from the Pittsburgh seam than was once possible using traditional room-and-pillar mining. Consequently, and because of high demand for Pittsburgh coal, Charles Sorbello and John Markovich became interested in purchasing and mining coal that both Consol and PCW left in place. Mr. Sorbello and Mr. Markovich estimated that between 1985 to 1989 they feasibly could remove approximately 75,000 to 100,000 tons of coal per year from what became known as the "Monongah mine." In making this estimate, they assumed they could subside structures where the surface own-

ers had conveyed the right to subjacent support, and as to those structures required by law to be protected, the angle of draw would be 15 degrees.[1]

Based on those estimates Mr. Sorbello bought all the corporate stock of the Monongah Development Company, the corporation that then owned the Monongah mine. In addition, Mr. Sorbello and Mr. Markovich formed the M & J Coal Company for the purposes of mining and selling the coal. In November and December 1985, M & J Coal invested a total of approximately $500,000 based on the expectation of recovering $400,000 per year from mining and selling coal.

Before plaintiffs purchased their rights to the Monongah mine, Congress had passed the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which regulates mining practices and techniques. 30 U.S.C. §§ 1201-1328 (1988). SMCRA empowers the Department of Interior to prohibit mining operations that endanger public health and safety or harm the environment:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice or violation also creates an **imminent danger to the health or safety of the public**, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclama-

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[1] The angle of draw determines the amount of coal that a mining company must leave under a structure to prevent subsidence-related damage. A 15-degree angle of draw requires that a mining company leave under a structure a pillar of coal

> tion operations or the portion thereof relevant to the condition, practice, or violation. . . . Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order impose affirmative obligations on the operator requiring him to take whatever steps the secretary deems necessary to abate the imminent danger or the significant environmental harm.

30 U.S.C. § 1271 (emphasis added).

From late 1985 to early 1990 plaintiffs mined more than 270,000 tons of coal from the Monongah mine. At the time plaintiffs began mining they did not have a mining permit as required by W. Va. Code § 22A-3-8 (1993); plaintiffs had applied for a transfer of the permit held by PCW, Permit No. UO-639, but the transfer did not take effect until March 28, 1986. Plaintiffs also adopted PCW's subsidence control plan, which required a 15-degree angle of draw under certain protected structures. However, plaintiffs did not submit that plan to the State of West Virginia until April 14,1986, and the State did not approve it until April 25, 1986.

II. Subsidence of the Dingus and Tarley Residences

On March 5, 1986 the seeds of this dispute began to sprout. On that day Carl Dingus filed a complaint with the West Virginia Department of Energy (WVDOE) alleging that deep mine operations had caused cracks in his driveway and breaks in his water line. State inspectors investigated the complaint and found that the damage had been caused by mining pursuant to Permit No. UO-639. Two days later the State issued a Notice of Viola-

tion (NOV) requiring the coal operator to fill in or repair large surface cracks. Because the transfer of PCW's permit to M & J Coal was not yet complete, the State issued the NOV against PCW.

On March 21, 1986 State and Federal inspectors conducted a joint inspection of the Dingus property, which resulted in the State issuing a NOV against M & J Coal for mining without a permit. The NOV required that M & J Coal cease mining until they obtained a permit. Six days later the State determined that plaintiffs had received but ignored the NOV and issued a formal cessation order. Also, around that time the State issued another NOV in which it ordered plaintiffs to cease mining until they notified all affected surface owners of the mining and possibility of subsidence. Apparently, plaintiffs had relied on notifications that PCW had given surface owners in 1983 and 1984.

During the inspection of the Dingus property, Joseph Tarley, a neighbor of Mr. Dingus, approached one of the state inspectors to complain of subsidence on his property. A few days later, on April 11,1986, Mr. Tarley sent a letter to Charles Sheets of the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM) complaining of subsidence which caused damage to his house and property. OSM responded by issuing the appropriate notice to the WVDOE advising them of Mr. Tarley's complaint.

April 25,1986 was an eventful day. At 10:45 a.m. Mrs. Tarley called William Berthy, an OSM inspector, to discuss the subsidence of her house and property. Inspector Berthy advised her that earlier that day the WVDOE had approved M & J Coal's subsidence control plan and had authorized it to continue mining. Later that day, at 1:00 p.m., Mr. Tarley called OSM and talked to Charles Sheets. Mr. Tarley advised Mr. Sheets that on the preceding day his house had subsided and that he presently was in the process of moving out. Mr. Tarley described the damage:

> The needle on the gas meter had been spinning wildly. The section of the gas line immediately

adjacent to the gas meter was severed. My water line to the public water supply also broke, and the access wires that the electric company had installed outside our house were leaning and stretching as tight as a fiddle string.

Fortunately, the gas line broke outside our house. In my experience, if the gas line had broken in the house—which could have happened—there probably would have been an explosion, due to the fact that there is a hot water pilot in the basement. If this had occurred, my wife and daughter, and possibly some of our neighbors, would have died or been seriously injured. During this time, my family feared for its and our neighbors safety.

Of the cracks in his yard Mr. Tarley stated:

I could not see the bottom but observed it widening while I looked. My neighbor's dog, which could have just as easily been a child, later fell into the crack outside the house. Although the dog, from the barking and crying sounds it made, survived the fall, it later died because rescue attempts were unsuccessful.

Even the initial cracking presented a dangerous situation. I believed that neighborhood children could easily have fallen into the crack and injured themselves. I reported this problem to the U.S. Office of Surface Mining in early May 1986. I observed that trespassers, probably children or juveniles, were endangering themselves by entering my property and attempting to remove items from the wreckage that we could not salvage.

III. OSM's Enforcement Activities

In the late afternoon of April 25, 1986, Charles Sheets, Mike Superfesky, and William Berthy, all OSM officials, met at the Tarley residence. The OSM officials observed the Tarley family loading their belongings into a moving van. Based on his observations of the scene, Mr. Superfesky found it necessary to order evacuation of the house: a large crack (greater than one foot wide) in the front yard propagated through the house; the front foundation was pulled five inches from the basement floor; the western foundation wall contained severe diagonal cracks four to six inches wide; there was a six-inch crack in the concrete basement floor near the furnace; and the front foundation and rear of the house was buckled. The subsidence of Mr. Tarley's house was so severe that Mr. Tarley had to install wood block cribbing and steel jack posts in the recreation room to prevent total collapse of the house.

Mr. Superfesky and Mr. Sheets spoke of the subsidence with Mike Nunan of the WVDOE, who stated that M & J Coal was in compliance with all applicable state statutes, rules, and regulations, and that the State wasn't going to issue any enforcement actions. Nonetheless, both Mr. Sheets and Mr. Superfesky believed that "no one has a right to subside another person's house," and, on April 25, 1986, issued a cessation order against M & J Coal "for a condition, practice, or violation creating an imminent danger to the health and safety of the public." According to Mr. Superfesky, OSM's main concern was that someone would fall into cracks or that the structure would fall on someone. In addition, OSM responded to evidence showing that the subsidence had ruptured natural gas and water lines and shifted the earth so as to move electric power poles and stretch power lines.

The cessation order required that M & J Coal (1) protect the public from surface cracks, (2) restore the subsided land's pre-subsidence capacity to support structures and previous uses, and (3) mine pursuant to a revised subsidence control plan. The cessation order was in effect for five days; on April 30,1986,

OSM approved a revised subsidence control plan for M & J Coal and lifted the cessation order. The new subsidence control plan required M & J Coal to increase the angle of draw under protected structures from 15 degrees to 30 degrees and, in contrast to the previous subsidence control plan, required that M & J Coal protect single family dwellings. Hence, the new plan compelled M & J Coal to leave more coal under protected structures and increased the number and nature of the structures that M & J had to protect.

Pursuant to 30 U.S.C. § 1275(a)(1), plaintiffs appealed OSM's cessation order. An administrative law judge (ALJ) and the Department of Interior's appellate tribunal, the Interior Board of Land Appeals (IBLA), adjudicated plaintiffs' appeal. The ALJ convened a formal hearing in which plaintiffs were represented by private counsel, presented their own witnesses, and cross examined the government's witnesses. During the hearing, plaintiffs made two arguments: (1) their mining had not caused the subsidence that gave rise to the cessation order; and (2) the cracks were not large enough to endanger public safety. However, the ALJ and the IBLA rejected both these arguments. M & J Coal Co. v. Office of Surface Mining Reclamation and Enforcement, Docket No. CH 6-15-R (1988); M & J Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 115 IBLA 8 (1990). They concluded that plaintiffs caused the subsidence of the Tarley and Dingus residences and that subsidence of that type could threaten the public in the future if it recurred. Id.

IV. Post-Enforcement Subsidence

Despite OSM's intentions, the revised subsidence control plan did not prevent future damage to the public. During the four years following the revision, cracks appeared in property owned by Mr. Wright; a section of Route 218 subsided; the water tank of the town of Worthington subsided; and Weadon Koon observed subsidence of his property which destroyed his fishpond and damaged his house. Defendant adduced expert

testimony, which relied on bore hole camera technology, that all this damage was caused by plaintiffs' underground mining operations. Plaintiff provided no evidence to rebut defendant's assertion.

Mr. Wright, whose property was approximately 2,000 feet from the Dingus and Tarley residences, first noticed subsidence of his property in or about late October 1986.[2] At that time he observed a crack on his land about one inch wide and about ten feet long. Over the next several days the width and length of the crack increased to six inches and twenty feet, respectively. On November 4, 1986, a section of pproximately ninety to one-hundred feet of Route 218 subsided, accompanied by additional subsidence of Mr. Wright's property. The subsidence of Route 218 and the new subsidence on Mr. Wright's property eventually joined, forming an oval shape approximately one-hundred feet long and eigh y-five feet wide. According to Mr. Wright, the road initially subsided three to six feet, and about an hour later a six-to-eight-inch-wide crack appeared in the sunken area. In response to this subsidence the State issued a NOV, pursuant to W. Va. Code § 22A-3-14(b)(1), requiring plaintiffs to repair the damage they caused. Plaintiffs complied with this NOV.

Route 218 is used regularly by commuters, businesses, school buses and state and municipal workers, including policemen, firemen and other emergency workers. On average, 4,500 vehicles traveled on Route 218 each day. In addition to damaging the road, the subsidence witnessed by Mr. Wright endangered an adjacent gas line and a 7,200 volt electric line, thereby necessitating protective excavation of the gas line and replacement of the electric power pole.

Approximately eleven months after the collapse of Route 218, the water tank of the town of Worthington subsided. Mayor Tracy Smith described the damage:

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[2] The record does not indicate whether Mr. Wright's deed to his land included the right to subjacent support.

The tank serves the Swisher's Hill and Helen's Run areas of Worthington, supplying water to roughly 104 families. The tank sits on a cement ring wall, which is approximately eight inches thick and 22 feet in diameter.

As a result of the subsidence, the ring cracked, causing the tank to tilt to one side, lifting the opposite side approximately one inch off the ground. Worthington's independent engineering consultant, Thresher Engineering, reported that because subsidence caused two cracks in the foundation, the water tank began pulling away from the foundation along approximately 65 percent of the ring wall's circumference. Fearing that the tank would topple, I had the tank filled to 1/2 or 2/3 capacity, thereby reducing its weight.

Although the water tank continues to function, I and Thresher Engineering are concerned that this subsidence will impair the tank's stability in the long run. For this reason, I was and still am concerned that this subsidence will endanger the safety of Worthington residents. A temporary or permanent loss of the water tank would be a dangerous situation because it would discontinue water service for general and emergency purposes, including fire fighting and health exigencies. To date the Town of Worthington does not have the funds needed to mitigate the previous subsidence by stabilizing its water tank.

On November 21,1987, the State issued a NOV, pursuant to W. Va. Code § 22A-3-14(b)(1), requiring plaintiffs to repair the damage they caused to the water tank. Plaintiffs complied with this NOV.

Approximately three years later, on November 24, 1990, Weadon Koon observed cracks in his living room, kitchen and basement. In addition, subsidence under his fish pond resulted in its complete destruction. M & J Coal filled those cracks at its own expense.

V. Plaintiffs' Claim

After completing their mining operations in the Monongah mine, plaintiffs filed suit in this court alleging a taking under the Fifth Amendment. Plaintiffs alleged that OSM's enforcement actions which required plaintiffs to increase the draw angle under protected structures and to protect single family dwellings deprived plaintiffs of 99,700 tons of coal they otherwise would have mined, and resulted in $580,000 in lost profits. Plaintiffs did not and could not challenge the validity under SMCRA of OSM's enforcement actions against M & J Coal. Plaintiffs already lost and failed to appeal such a challenge. Rather, plaintiffs' complaint averred that OSM's enforcement actions constituted a "regulatory taking." More specifically, plaintiffs alleged that by requiring M & J Coal to modify its subsidence control plan OSM deprived M & J Coal of its right to mine coal, and that such deprivation constituted a taking of plaintiffs' property rights without compensation in violation of the Fifth Amendment.

While plaintiffs may have suffered lost profits as a result of OSM's enforcement actions, plaintiffs mining operations were otherwise profitable. Plaintiffs' total profit from their mining operations — as calculated by subtracting M & J Coal's reported losses from the sum of Charles Sorbello's and John Markovich's total salaries and M & J Coal's total profits — was $692,086.41. When this figure is divided by M & J Coal's cost basis, plaintiffs total rate of return during the entire operation was 138 percent, or 34.5 percent annually. Except for a period of approximately five days, occasioned by OSM's cessation order, plaintiffs never laid off any part of their Monongah Mine work force of approximately 12 employees either before

or after they adopted the 30-degree plan. Other than the coal they mined, plaintiffs never sold any of their property or other assets. None of plaintiffs' actual or prospective customers refused to transact, contract, or otherwise do business with plaintiffs as a result of either OSM's cessation order or the 30-degree plan. During most of the quarterly period after OSM issued its cessation order, and during each year from 1985 to 1989 inclusive, plaintiffs' Monongah Mine coal production increased.

DISCUSSION

I. Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact" so that the moving party "is entitled to judgment as a matter of law." RCFC 56(c). In evaluating a motion for summary judgment, any doubt as to whether a genuine issue of material fact exists must be resolved in favor of the non-moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970); Campbell v. United States, 2 Cl. Ct. 247, 249 (1983). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Chevron U.S.A., Inc. v. United States, 17 Cl. Ct. 537, 540 (1989), rev'd on other grounds, 923 F.2d 830 (Fed. Cir. 1991). When the moving party has carried its burden, the non-moving party must come forward with specific facts showing that a genuine issue for trial exists, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986), and the non-moving party may not discharge its burden by cryptic, conclusory, or generalized responses. See Willetts v. Ford Motor Co., 583 F.2d 852, 856 (6th Cir. 1978); Tunnell v. Wiley, 514 F.2d 971, 976 (3d Cir. 1975). "[When] the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

In Fifth Amendment takings cases courts should grant a motion for summary judgment only in unusual circumstances involving extraordinary facts. Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed Cir. 1983). The question of whether a taking has occurred is frequently fact-intensive, requiring the development of a complete record through trial. Id. Summary judgment is appropriate in this case, however, because the parties have stipulated to all the facts necessary to make a decision on the merits.

II. Regulatory Takings Analysis

As a general rule, the government is not required to pay for the incidental effects of its laws and regulations. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). As stated by Justice Holmes, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). However, when a governmental restriction goes too far, the government must compensate those it harms. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992); Penn Central, 438 U.S. at 124. How far is too far depends on the facts and circumstances of each case. Id.

In deciding whether a governmental restriction constitutes a "taking," courts engage in ad hoc, factual inquiries that consider several factors. Penn Central, 438 U.S. at 124. Of particular importance is the extent to which the restriction has interfered with distinct investment-backed expectations. Id. Interests that are not sufficiently bound up with the reasonable expectations of the claimant are not "sticks" in the claimant's "bundle of rights" and thus do not constitute property for Fifth Amendment purposes. Id. at 124-25. The economic impact of the restriction on the claimant also is important. Id. at 124. However, even where a governmental restriction deprives a claimant of all economically beneficial use of its property, the government may resist compensation if the proscribed inter-

ests were not part of the title to begin with. Lucas, 112 S.Ct. at 2899. For example, a government action is not a taking, regardless of the extent of the deprivation, if it proscribes a use that previously was impermissible under relevant property and nuisance principles. Id. at 2901. Those principles include federal laws. Preseault v. United States, 27 Fed. Cl. 69, 88 (1992).

The above precedent suggests a two-tiered approach to analyzing a takings claim. First, a court must determine whether the claimant held a property right that is compensable under the Fifth Amendment. Preseault, 27 Fed. Cl. at 87; Board of County Supervisors v. United States, 23 Cl. Ct. 205, 208 (1991). A compensable right does not exist if it was not part of the claimant's title at the time the claimant took title to the property. Lucas, 112 S. Ct. at 2899; Preseault, 27 Fed. Cl. at 87. For example, if at the time of sale an existing law or regulation precluded a certain use, that use was never a "stick" in the purchaser's "bundle of rights." Lucas, 112 S.Ct. at 2899-90; Preseault, 27 Fed. Cl. at 84. Second, if the claimant establishes the existence of a compensable right, the court must determine whether the governmental action constituted a taking of that right. In making that determination the court must consider (1) the nature of the government's action, (2) the economic impact on the claimant, and (3) the extent to which the action interfered with the claimant's legitimate investment-backed expectations. Penn Central, 438 U.S. at 124; Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1345 (1992).

III. The Merits of Plaintiffs' Takings Claim

Plaintiff alleged that OSM's enforcement actions requiring M & J Coal to modify its subsidence control plan constituted a taking of its property without just compensation. This purported "taking" had two parts: (1) the new plan required M & J Coal to mine pursuant to a 30-degree subsidence control plan; (2) the new plan added single family dwellings to those structures that M & J had to protect. Each part requires a separate analysis.

A. OSM's Enforcement Action Requiring That M & J Coal Mine Pursuant to a 30-Degree Subsidence Control Plan Was Not a Taking of a Cognizable Property Right.

One of the property rights that plaintiffs alleged they lost was the right to mine coal pursuant to a 15-degree subsidence control plan; plaintiffs claimed damages for the quantity of coal that they had to leave in the ground as a result of OSM requiring them to mine pursuant to a 30-degree plan instead of a 15-degree plan. However, plaintiffs failed to establish any legally cognizable right to mine coal in accordance with a 15-degree plan. Plaintiffs pointed to no state or federal law, regulation, permit, or practice that gave them such a right. The right that plaintiffs alleged derived solely from plaintiffs' subjective evaluation of standard mining practices in West Virginia. At the time plaintiffs purchased their mining rights they knew that they could not mine coal so as to damage structures that West Virginia law required them to protect. Plaintiffs assumed that the angle of draw necessary to protect such structures would be 15 degrees. They based that assumption not on any state-approved standard or practice but on their own understanding of common mining practices in West Virginia. Plaintiffs developed that understanding from a review of literature on the subject and from their own experience in the mining industry.

Subjective evaluations of what the law requires, such as those held by plaintiffs, cannot form the basis for a legally cognizable right in a takings analysis. A contrary finding would place in the hands of the individual the power to create rights recognized by society. Our form of democracy does not permit such a result. State laws requiring plaintiffs to protect certain structures from damage caused by underground mining operations were in place at the time plaintiffs purchased their mining interests. Plaintiffs cannot claim that their own understanding of what those laws might require for them should trump a different understanding by OSM. Such a finding would render the regulations meaningless.

Plaintiffs also did not establish an expectancy right to mine under a 15-degree plan. Under West Virginia law, each coal operator must obtain a state permit before beginning mining operations. W. Va. Code § 22A-3-8 (1993). The permits are subject at all times to modification or suspension by OSM. 30 U.S.C. § 1271(a)(2); see also 30 U.S.C. § 1271(b). At the time plaintiffs purchased their mining rights to the Monongah mine they did not have a permit that granted them the right to mine under a 15-degree plan. However, even if they had such a permit, that permit would have been subject at all times to modification by OSM. Plaintiffs knew or should have known of that possibility at the time they made their investment. Thus, they never had a legitimate expectation of mining coal using any specific angle of draw. The angle of draw that the State or OSM would require plaintiffs to use was an uncertainty that was part of the business risk that plaintiffs took when they made their investment. Plaintiffs knowingly entered into a highly regulated industry; they cannot claim OSM's execution of existing regulations was unforeseeable at the time they made their investment.

Plaintiffs' only cognizable expectation was that OSM would act within scope of its regulatory authority. An ALJ and the IBLA already decided that OSM's enforcement actions were legitimate exercises of OSM's authority, under 30 U.S.C. § 1271, to protect public health and safety. The court cannot at this juncture re-litigate that issue.[3] Moreover, post-enforcement subsidence highlights the prudence of OSM's actions; even the 30-degree plan did not prevent the collapse of Route 218 or subsidence to the Town of Worthington's water tank. Those events posed serious threats to the health and safety of the public.

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[3] For the purposes of this case the court must assume that the agency acted within the scope of its authority. The court has jurisdiction over this case pursuant to the Tucker Act. 28 U.S.C. 1491(1988). Under the Tucker Act this court may not award damages for unauthorized agency action. Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987).

The existence of a cognizable property right is a prerequisite to finding a governmental taking. See Lucas, 112 S.Ct. at 2899-90; Preseault, 27 Fed. Cl. at 84; Board of County Supervisors, 23 Cl. Ct. at 208. The right to mine under a 15-degree plan was not part of plaintiffs' title when they purchased their rights to the Monongah mine. Accordingly, their takings claim which was founded on that right must fail. Plaintiffs cannot recover for deprivation of a right they never had. Id.

B. OSM's Enforcement Action Requiring M & J Coal to Protect Single-Family Dwellings Was Not a Taking of a Cognizable Property Right.

Plaintiffs also alleged that by requiring them to protect all single family dwellings the government usurped a right that they had purchased: the right to mine under certain land without being liable for damages caused to the surface. Plaintiffs averred that surface owners sold away their right to structural support through mineral severance deeds granted between 1904 and 1920, and that OSM's actions amounted to a reassignment of such structural rights from plaintiffs to the surface owners. According to plaintiffs, that reassignment constituted a taking without just compensation in violation of the Fifth Amendment.

As before, plaintiffs failed to establish that they owned the right that was the basis for their claim. At the time plaintiffs purchased their rights to the Monongah mine, SMCRA forbade any coal operator from engaging in mining practices that endanger public health and safety. 30 U.S.C. § 1221. A title to property does not include rights forbidden by law at the time title transfers. Lucas, 112 S.Ct. at 2899-90; Preseault, 27 Fed. Cl. at 84. Because plaintiffs' title was limited at all times by SMCRA, their only legitimate expectation was that OSM would act within the scope of its regulatory authority in enforcing SMCRA The IBLA and an ALJ determined that OSM's actions requiring plaintiffs to protect single-family dwellings were legitimate exercises of

OSM's regulatory authority. In finding that OSM's actions were necessary to protect public health and safety, the IBLA stated:

> It cannot be seriously contended that ruptured gas and water pipes, twisting and cracking walls, doors and windows separating from their mountings, chimneys separating from furnaces, and large cracks in the surface do not present an expectation of death or serious injury to the rational person exposed to such conditions. The record presents a graphic picture of an imminent danger situation and although little could be done to protect the Dingus and Tarley residences, the Millers [neighbors of Mr. Tarley and Mr. Dingus] and their property were clearly threatened. The surface cracks had proceeded through the Tarley property and onto Miller's property on April 25, 1986, and at the inspection on that day, Miller informed [OSM] of his safety concerns. M & J's contentions to the contrary lack merit and deserve no additional discussion.

M & J Coal Co., 115 IBLA at 23-24. The ALJ also noted that the purpose of OSM's actions was "that of protecting other nearby residents whose residences would also be put at risk by M & J's continuing underground mining activity." M & J Coal, Docket No. CH 615-R at 10.

While it is not the purpose of this court to review the findings and conclusions of the IBLA or ALJ, the court does agree with them. OSM's enforcement actions may have had the incidental effect of benefiting surface owners, but the court is satisfied that OSM's actions were necessary to protect public health and safety. When M & J Coal caused private homes to subside, they endangered not only the owners of the homes but the com-

munity. The subsidence of the Dingus and Tarley residences caused gas lines to rupture, power lines to stretch, water lines to burst, and resulted in large cracks in the earth's surface. It is common sense that: broken gas lines could ignite spreading fire throughout the neighborhood; fallen power lines could spark fires and present a hazard to children in the community; ruptured water lines could disrupt water service to the community, exacerbating the problems that spreading fires would create; and large cracks in the ground create a hazard to children that might wander into the area. All those conditions would unfold without warning, as "subsidence occurs, seemingly on a random basis, at least up to 60 years after mining." H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977) reprinted in 1977 U.S.C.C.A.N. 593, 658. OSM acted to prevent the spontaneous development of dangerous conditions. The court agrees that OSM's actions were necessary to protect public health and safety.

Included in plaintiffs' title was the right to mine coal without being liable for damages to surface owners. However, that right was limited at all times by OSM's power to ensure the health and safety of the public. Plaintiffs therefore could not claim that OSM's enforcement actions exacted a right that plaintiffs had purchased. OSM's actions did not require plaintiffs to pay for damages they already caused to the homes of surface owners; they did not require plaintiffs to change their mining operations where danger to homes did not exist, such as in open farmland; and they did not cause plaintiffs to cease all mining operations under private homes. Rather, OSM's actions only required plaintiffs to leave more coal under single family dwellings in order to prevent the occurrence of a hazardous condition, the spontaneous collapse of a house.

C. Plaintiffs' Case Differed Materially From Pennsylvania Coal v. Mahon.

Plaintiffs argued that their case could not be distinguished in any meaningful or substantive way from the Supreme Court's

decision in Pennsylvania Coal v. Mahon, 260 U.S. at 392 (1922). Plaintiffs also argued that the Supreme Court's decision in Pennsylvania Coal was not overruled by the Court's subsequent holding in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Plaintiffs' latter argument was correct, but not the former.

Plaintiffs correctly argued that the Supreme Court's decision in Pennsylvania Coal did not expressly overrule its decision Keystone. In fact, the Court distinguished its decision in Keystone on at least two grounds.[4] Keystone, 480 U.S. at 485. Nonetheless, Keystone casts a shadow over Pennsylvania Coal leaving the holding of Pennsylvania Coal in question. This court need not determine the extent of that shadow, however, because it finds that plaintiffs' case differed materially from Pennsylvania Coal.

Pennsylvania Coal involved the validity of the Kohler Act, which the Pennsylvania legislature passed on May 27,1921. Pennsylvania Coal, 260 U.S. at 412. The Kohler act gave landowners the right to prevent coal operators from mining under their property in such a way as to cause subsidence of their land. The plaintiff in Pennsylvania Coal was a coal operator that, in 1878, had purchased the surface owner's rights to subjacent support. Id. When those surface owners invoked the Kohler act to prevent the Pennsylvania Coal Company from mining under their property, the Pennsylvania Coal Company responded with a takings claim. It alleged that the Kohler Act, as applied, constituted a taking by the State of Pennsylvania without just compensation. Id. The Supreme court agreed. Pennsylvania Coal, 260 U.S. at 414-15.

Plaintiffs' case differed from Pennsylvania Coal in two ways. First, and of greatest importance, plaintiffs in this case purchased their mining rights several years after the passage of

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[4] The Supreme Court stated the cases differed with respect to the (1) character of the governmental action involved, and (2) the extent of the interference with investment-backed expectations. See Keystone Coal, 480 U.S. at 485.

SMCRA. Thus, the bundle of rights plaintiffs purchased was subject to the limitations of SMCRA. In contrast, the Kohler Act was passed more than forty years after the Pennsylvania Coal Company purchased its mining rights. Id. at 412. Therefore, the application of the Kohler Act exacted rights that the Pennsylvania Coal Company had purchased; OSM's enforcement of SMCRA did not have such an effect on plaintiffs. Second, the Supreme Court found that the purpose of the Kohler Act was to benefit surface owners at the expense of the owners of the mineral rights. Id at 413. In this case, however, OSM responded to protect public health and safety in the future. Despite what plaintiff argued, OSM did not act to benefit either Mr. Tarley or Mr. Dingus; their houses had already subsided. In Keystone, the Supreme Court found such a public purpose to be a significant factor in distinguishing the Keystone holding from that in Pennsylvania Coal. Keystone, 480 U.S. at 485. The public purpose behind OSM's actions similarly distinguish the holding of this case from that of Pennsylvania Coal. Accordingly plaintiff's reliance on Pennsylvania Coal was inapt.

CONCLUSION

Plaintiffs' takings claim hinged on the establishment of a cognizable property right to mine pursuant to a 15-degree subsidence control plan and to subside private dwellings. Because plaintiffs failed to establish either of those rights, their takings claim must fail. Accordingly, the court grants defendant's motion for summary judgment and denies plaintiffs' cross motion. The Clerk is directed to dismiss the complaint. No costs.

IT IS SO ORDERED.

/s/ MOODY R. TIDWELL
Judge

State of West Virginia

JUDGES COUNTY

DIVISION 1

FRED L. FOX, II, CHIEF JUDGE
P.O. BOX 629
FAIRMONT, WEST VIRGINIA 26555 OF
(304) 367-5390

DIVISION 2

RODNEY B. MERRIFIELD, JUDGE
P.O. BOX 334 MARION
FAIRMONT, WEST VIRGINIA 26555
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SIXTEENTH JUDICIAL CIRCUIT

12 October 1988

W. Henry Lawrence IV, Esq.
P.O. Box 2190
Clarksburg, WV 26302-2190

Robert M. Amos, Esq.
1801 Locust Avenue
Fairmont, WV 26554

RE: STANLEY, ET UX. V. M & J COAL CO., INC.
CIVIL ACTION NO. 88-C-29
URICH V. M & J COAL CO., INC.
CIVIL ACTION NO. 88-C-30

Gentlemen:

This matter comes on for decision regarding defendant's Motion(s) for Summary Judgment in each case. The issues therein have been thoroughly briefed and, additionally, a hearing was conducted on 19 June 1988.

Defendant maintains its right to summary judgment in each case is based on the fact that it had no duty to provide subjacent support for the landowners, inasmuch as same was expressly waived by plaintiffs' predecessor in title. Further, defendant alleges the action of the federal Office of Surface Mining in forcing defendant to revise its Subsidence Control Plan to protect private landowners was an extension of private rights not provided for in State regulations and amounted to an unconstitutional taking of property.

Plaintiffs oppose summary judgment on the basis that defendant had a duty to provide subjacent support, based upon their (plaintiffs) interpretation of the language in predecessor deeds and the type of mining in utilization at the time of severance. Further, plaintiffs rely upon the doctrine of estoppel, the "present tendency of our Court to protect the landowner," and federal law.

Based upon an extensive review of all of the above, I would make the following findings:

(1) A surface owner is entitled to subjacent support. Failure to provide such support by a deep mine owner will cause said deep mine owner to become liable to the surface owner for damages; however, the law clearly permits the surface owner to waive such protection if such waiver is clearly and expressly made. A surface owner may also waive its right to recover damages caused by subsidence by expressly releasing the mineral owner from liability.

(2) A subsequent surface owner stands in the shoes of its predecessor in title. Thus, where a predecessor in title has clearly and expressly waived its right of subjacent support, and/or its right to recover damages caused by subsidence, such waiver is binding on subsequent surface owners. The record in this case contains such express and clear waiver, and same would therefore apply to the plaintiffs herein.

(3) West Virginia Code 22A-3-14 provides for the promulgation of regulations directed toward the surface effects of underground mining. The constitutionality of said Code provision has not, in this case, been challenged.

(4) West Virginia Surface Mining Reclamation Regulations were promulgated in 1985 in response to the above cited Code provision. Said regulations provide that "underground mining activities shall not be conducted beneath or adjacent to public buildings and facilities, churches, schools, hospitals, or impoundments . . . of water . . . " (W.Va. Surface Mining Reclamation Regs. Subsection 7C.02(d)). Otherwise, a person who conducts underground mining which results in subsidence is liable if he "does not specifically possess the right to subside . . ." (W.Va. Surface Mining Reclamation Regs. Subsection 7C-02(b)). Thus, the West Virginia regulations do not protect private landowners whose predecessors in title had waived their right to subjacent support or damages caused by subsidence. Incidentally, I do not entirely agree with defendant's position that a regulation which protected mere landowners would have been unconstitutional. (See Keystone Coal Assoc. v. DeBenidictis, 480 U.S. , 108 S.Ct. , 94 L.Ed2d 472, 488 (1987), as cited in defendant's Memorandum).

(5) The addition, by the federal Office of Surface Mining, of the protection of private homes to the M & J Subsidence Control Plan amounts to an unconstitutional alteration of the West Virginia Regulation (7C.03(d)) which protects only public buildings, by extending the protection to include private homes.

(6) Such action by the OSM amounts to an appropriation of private property (M & J's right to all of the coal it purchased) without compensation. As to the landowners, ". . .(s)o far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risks have become a danger warrants the giving to them

greater rights than they bought." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922).

Therefore, defendant's Motion for Summary Judgment is granted as to each case. I am constrained to add that, under the circumstances of these particular cases, although I might not agree with this result and might question the relative equties, I feel the law supporting this ruling to be clear and binding.

Counsel for the defendant is directed to prepare an Order reflecting the Court's ruling herein, and present same to opposing counsel for initialing and subsequent entry.

Very truly yours,

Fred L. Fox, II
[JUDGE, DIVISION 1]

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA

TOWN OF WORTHINGTON,
A MUNICIPAL CORPORATION,

Plaintiff,

v. Civil Action No. 88-C-241

M & J COAL COMPANY, INC.,

Defendant.

ORDER

On the 8th day of January, 1990, came the plaintiff, the Town of Worthington, by its counsel Roger D. Curry, and the defendant M & J Coal Company, Inc., by its counsel W. Henry Lawrence IV, for a duly-noticed hearing on the Defendant's Motion for Summary Judgment. Whereupon, the Court entertained argument of counsel with respect to the issues addressed in the Motion for Summary Judgment and Supporting Memorandum. The defendant argued that it was entitled to summary judgment for the following reasons:

1. The plaintiff's predecessor in title had waived its right of subjacent support in the severance deeds conveying the mineral and surface interests;
2. The plaintiff's predecessor in title had waived and released all liability for subsidence-related damages in prior severance deeds conveying the mineral and surface interests;
3. The plaintiff's water tower was not a protected structure under West Virginia law; and

4. The Office of Surface Mining had improperly modified the defendant's State-approved subsidence control plan to require enlargement of the angle of repose from the 15° standard adopted and approved by the State to the 30° angle of repose imposed arbitrarily by the federal Office of Surface Mining.

Whereupon, the plaintiff responded and argued that the common law waiver does not apply to municipal or public buildings, such as the plaintiff's water tower.

After mature consideration, the Court indicated that it would grant the Defendant's Motion for Summary Judgment.

For purposes of this ruling on summary judgment, the Court recognizes the precedent in this State to accept as correct the factual allegations made expressly or raised implicitly by the non-moving party. Accordingly, for purposes of this ruling, the Court adopts the following facts:

The plaintiff Town of Worthington owns a right of way on two and one-half acres located on Swisher Hill in Lincoln District, Marion County. This right-of-way grant to the Town of Worthington was made on November 2, 1949 by the surface owners Lantz and Thelma Williams and is of record at page 62 in Deed Book 496 in the office of the Clerk of the Marion County Commission. The grant conveyed to the Town of Worthington "a right of way to lay, maintain, operate and remove a pipe line for the transportation of water on, over, through and across their lands."

The surface property owned by Lantz and Thelma Williams was conveyed to them by deed dated April 18, 1942 of record at page 95 in Deed Book 376 in the office of the Clerk of the Marion County Commission. This conveyance was subject to the prior severance and conveyance of the underlying coal together with all mining rights and privileges.

The original severance of the surface from the mineral interest for the Williams' tract is found in two deeds. The first deed is dated December 5, 1899 and conveyed one-third of the coal underlying the Williams property from Johnson N. Camden and Annie T. Camden, his wife, to the Monongahela River

Railroad Company, at Deed Book 91, page 99. This deed conveyed three tracts of coal containing 3469 acres total, including a one-third interest in a 195 acre tract of land and coal previously conveyed to J. N. Camden from Joseph E. Sands and Mary Virginia Sands, his wife, at Deed Book 89, on page 111 and dated July 25, 1899.

This first deed to the Monongahela River Railroad Company provided a fee simple conveyance to "all the real estate coal and mining privileges embraced in the said deeds of Johnson N. Camden" and contained the stated object to "convey to the said Monongahela River Railroad Company the land and coal and mining rights . . . ."

The second deed conveyed the other two-thirds of the coal underlying this 195 acre tract from A. N. Prichard to The Monongah Company and the Monongahela River Railroad Company, and is dated January 6, 1904 and of record in Deed Book 129, at page 340. In partial consideration, The Monongah Company and the Monongahela River Railroad Company conveyed their one-third surface interest in this 195 acre surface tract to A. N. Prichard, who then also owned the remaining two-thirds of the surface interest.

The mineral conveyance included "all his [A. N. Prichard's] undivided two-thirds interest in all the Pittsburgh or Nine Foot vein of coal . . . together with the mining rights and privileges necessary and convenient for the removal of the same."

The mining rights also provided:

> There is also granted the right to enter upon and under said land to mine and remove all of said coal, and to remove upon and under said land the coal from and under neighboring and conterminous lands, and make all structures, roads, and excavations necessary for the mining and removal of said coal, and coal from under other neighboring and coterminous lands to-

> gether with all necessary and convenient rights of way through and under such lands, with necessary drainage, ventillation [sic] and ventillating [sic] shafts to remove said coal upon or under said land, and also to remove the coal from under other neighboring and coterminous lands, without being liable for any injury or damage done thereby or occasioned therefrom to the overlying surface or anything therein or thereon, or to any water or water courses therein or thereon. (Emphasis added)

By various deeds and leases, M & J is now the successor in title to The Monongah Company and the Monongahela River Railroad Company. As such, the mining rights provided by the severance deed apply equally to it.

In a subsequent deed, A. N. Prichard conveyed his surface interest to Frank H. and Lexina Shore on January 27, 1904. This deed recognized the earlier mineral severance and grant of mining rights and is of record at page 407 in Deed Book 129 in the office of the Marion County Commission Clerk. This deed conveyed the 195 acres of surface subject to the prior conveyance and reservation of the underlying mineral interest providing:

> Saving and excepting therefrom the Pittsburgh ornine [sic] foot vein of coal together with the right to enter upon and under said land to mine and remove all of said coal, and to remove upon and under said land the coal from and under other neighboring and coterminous lands, and make all structures, roads and excavations necessary for the mining and removal of said coal, and coal from and under other neighboring and conterminous lands together with all necessary and convenient rights of way through and under such lands, with necessary drainage,

> ventilation, and ventilating shafts to remove said coal upon or under said land; and also to remove coal from under neighboring and coterminous lands, without being liable for any injury or damage done thereby or occasioned therefrom to the overlying surface or anything therein or thereon, or to any water or water courses therein or thereon. (Emphasis added)

By various deeds, Thelma and Lantz Williams are the successors in title to Frank and Lexina Shore. As such, the mining rights created by the severance deed apply equally to them. By virtue of its right of way through the Williams' property, the rights provided by the severance deed also apply equally to the Town of Worthington.

In October, 1987, the defendant removed "barrier coal" in the area of plaintiff's water tower in Lincoln District of Marion County, West Virginia by the method known as room and pillar mining. Such mining was conducted pursuant to West Virginia Department of Energy deep mining permit with an approved subsidence control plan which originally provided for a 15° angle of critical deformation to prevent coal removal within 15° of protected structures. On April 30, 1986, OSM mandated a revision to the defendant's subsidence control plan requiring a 30° angle of critical deformation or repose for protected structures. For purposes of this order but without ruling thereon, the Court finds that the plaintiff's water tower was a protected structure under West Virginia law and that mining occurred within the 30° angle of critical deformation but outside the 15° angle of deformation. The Court further finds for purposes of this order but without ruling thereon that the plaintiff's water tower was damaged by such mining.

The Court concludes as a matter of law that the valid waivers of support and liability found in the severance deeds were enforceable against a municipality which acquired the property by subsequent conveyance. Accordingly, the Court rules that the plaintiff's predecessors in title waived their rights

to subjacent support and, further, the plaintiff's predecessors in title waived and released the defendant's predecessor in title from any liability for damages resulting from mining, both of which waivers and releases are binding on the plaintiff. Furthermore, the Court rules that the defendant has not violated any West Virginia surface mining law, rule, regulation, order or permit and, therefore, is entitled to summary judgment. The Court rules that the defendant did not violate its State-approved subsidence control plan which was improperly modified by the federal Office of Surface Mining ("OSM") to increase the angle of repose from 15° to 30°. This OSM modification was contrary to State and federal law, which provides that OSM shall not supercede any state regulation except where inconsistent with federal law. Since the West Virginia subsidence regulations providing a 15° angle of repose are not inconsistent with federal law, OSM lacked jurisdiction to impose the angle of repose modification.

It is accordingly ORDERED that the Defendant's Motion for Summary Judgment is granted and this matter is dismissed with prejudice and removed from the docket of this Court. The plaintiff's objections and exceptions are noted to all of the adverse rulings.

ENTER: 4/11/90

(SIGNED) RODNEY B. MERRIFIELD
Judge

Order Prepared and Submitted by:

(SIGNED) W. Henry Lawrence IV

Attorney for M & J Coal Company, Inc.

Approved As to Form:

(SIGNED) Roger D. Curry

Attorney for the Town of Worthington

Respectfully submitted,

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FILED
JUN 12 1995

(2)

No. 94-1851

In the Supreme Court of the United States

OCTOBER TERM, 1995

M & J COAL COMPANY AND MONONGAH DEVELOPMENT COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Monongah Development Company purchased rights to extract coal from the Monongah Mine and leased those rights to petitioner M & J Coal Company. Petitioners contend that federal regulators took their property by requiring M & J Coal to provide subjacent support to the surface estate overlying the mine in a manner that diminished the value of petitioners' mineral estates. The questions presented are:

1. Whether the property interests that petitioners acquired were limited by pre-existing restrictions on mine operators' rights to cause subsidence damage, restrictions that included a federal statutory prohibition against mining practices that endanger the public health and safety.

2. Whether, if petitioners were not limited by pre-existing restrictions, the restriction placed on petitioners' mining operations in order to abate a danger to public health and safety rose to the level of a Fifth Amendment taking.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1851

M & J COAL COMPANY AND MONONGAH DEVELOPMENT COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-16a) is reported at 47 F.3d 1148. The opinion of the Court of Federal Claims (Pet. App. 17a-38a) is reported at 30 Fed. Cl. 360.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. The petition for a writ of certiorari was filed on May 11, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

In July 1981, petitioner Monongah Development Company acquired rights to extract coal from the Monongah Mine in Marion County, West Virginia, and in 1985 it leased those rights to petitioner M & J Coal Company. Pet. App. 6a. In April 1986, the Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior found that M & J Coal's operations were causing surface subsidence that posed an imminent threat to public health and safety. *Id.* at 7a-8a. Pursuant to statutory authority, OSM ordered M & J Coal to cease mining until it abated that threat. Petitioners sued the United States in the Court of Federal Claims, contending that OSM's action had effected a taking of their property for which they were entitled to compensation. *Id.* at 8a-10a. The court granted the government's motion for summary judgment, and the court of appeals affirmed. *Id.* at 16a.

1. The legal ability of mineral interest owners in West Virginia to subside overlying surface estates is shaped by state common law and by state and federal statutes and regulations.

a. Under West Virginia common law, when surface and mineral estates are separated, the right of subjacent support may be retained for the benefit of the surface estate or disclaimed to increase the value of the mineral estate. See, *e.g.*, *Winnings* v. *Wilpen Coal Co.*, 59 S.E.2d 655, 658 (W. Va. 1950). Deed language is construed strictly to prevent inadvertent alienation of the right of subjacent support from the surface estate. *Ibid.* A surface owner's waiver of the right of subjacent support, once established, gives the mineral estate owner partial protection from common law tort

actions. A surface estate owner who has waived the right of subjacent support (or the successor to such an owner) may not enjoin or recover damages under a private nuisance or negligence theory for subsidence within the scope of the waiver. See, *e.g.*, *Rose* v. *Oneida Coal Co.*, 375 S.E.2d 814, 816 (W. Va. 1988); *Stamp* v. *Windsor Power House Coal Co.*, 177 S.E.2d 146, 148-150 (W. Va. 1970). An enforceable waiver by one surface estate owner, however, does not affect the common law rights of adjoining property owners, or of the public generally, to be free of hazards caused by underground mining operations.[1]

b. Enacted in 1980, the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA)[2] established a comprehensive regulatory program that "changed many of the old common law rules concerning the rights and remedies of surface owners *vis a vis* mineral owners." *Rose*, 375 S.E.2d at 816. That legislation was prompted by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which established minimum national standards to control the environmental effects of surface mining (as well as the surface effects of underground mining) and a mechanism for States with qualifying programs to obtain primary regulatory jurisdiction over mining within their borders. See SMCRA

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[1] Compare, *e.g.*, *Wilson* v. *Phoenix Powder Mfg. Co.*, 21 S.E. 1035, 1036-1037 (W. Va. 1895) (explosives factory in populated area "is a public nuisance, and indictable as such"); see also *West* v. *National Mines Corp.*, 285 S.E.2d 670, 674-677 (W. Va. 1981) (coal haulers' right to use public road limited by homeowners' rights to be free from dust).

[2] 1980 W. Va. Acts ch. 87, initially codified at W. Va. Code §§ 20-6-1 *et seq.* (1981), currently codified, as amended, at W. Va. Code §§ 22-3-1 *et seq.* (1994).

§ 503, 30 U.S.C. 1253 (procedures for establishing state programs); see also 30 C.F.R. Pts. 730-732 (federal regulations governing state programs).

In accordance with SMCRA, WVSCMRA addressed the surface effects of underground mining as well as the effects of surface or strip mining operations.[3] West Virginia's program, including both WVSCMRA and the State's proposed regulations, was conditionally approved by OSM in January 1981. See 46 Fed. Reg. 5915 (1981). Interim provisions of the State's two-stage program took effect immediately.[4] The State's "permanent program," also set out in the initial regulations, took effect in 1983, following the termination of a state-court injunction against its implementation.[5]

West Virginia's program has closely tracked the SMCRA and the implementing federal regulations. In accordance with federal standards, West Virginia has required underground mining operators to take steps

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[3] Compare 1980 W. Va. Acts ch. 87, § 20-6-14(b)(1) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) (1994)) with SMCRA § 516(b)(1), 30 U.S.C. 1266(b)(1) (underground mining permits must include "measures * * * to prevent subsidence causing material damage").

[4] See W. Va. Surface Mining Reclamation Regulations (W. Va. SMRR) (1981). Subsequent, revised versions of those regulations were promulgated as W. Va. SMRR (1985) and W. Va. Code of State Regulations (W. Va. CSR) (1991). Relevant provisions of those regulations are reprinted at Gov't C.A. Br. A1-A34.

[5] See *Allegheny Mining Corp.* v. *Callaghan*, No. 81-579 (Kanawha County Cir. Ct. Feb. 13, 1981) (enjoining implementation of parts of West Virginia's state program); Order, *Allegheny Mining Corp.* v. *Callaghan*, No. 81-579 (Kanawha County Cir. Ct. Sept. 10, 1981) (extending injunction).

to prevent subsidence damage and to remedy some of the subsidence damage that nevertheless occurs. The subsidence-prevention component of the State's program has included a requirement that underground mine operators give surface owners and occupants six months' notice before mining beneath them and a prohibition on most mining beneath or in close proximity to public buildings, roads, and bodies of water.[6] The remedial component has included requirements that mine operators restore subsided land and, at times, that they repair or pay compensation for subsidence damage to structures.[7] During the period relevant here, primary responsibility for administration of those requirements was entrusted to the West Virginia Department of Energy (WVDOE).

c. When OSM approved West Virginia's program under SMCRA Section 503, the State assumed primary "regulatory authority in West Virginia for all surface coal mining and reclamation operations * * * on non-Federal and non-Indian lands." 30 C.F.R. 948.10. However, the Secretary of the Interior, acting through OSM, remained obligated to issue a federal cessation order whenever federal inspection of a West Virginia mine revealed a "condition [or] practice [that] * * * creates an imminent danger to the health or

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[6] See 1980 W. Va. Acts ch. 87, § 20-6-14(b)(1) and (c)-(d) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) and (c)-(d) (1994)); W. Va. SMRR 7C.01, 7C.03 (1981) (current versions codified at W. Va. CSR 38-3-12, 38-3-16.2(d) (1991)).

[7] See W. Va. SMRR 7C.02(a)-(b) (1981) (current version codified at W. Va. CSR 38-6-16.2(c)(1)-(2) (1991)). In late April 1986, when OSM undertook the enforcement action that gave rise to this litigation, state regulations did not require underground mine operators to remedy subsidence damage to structures. See W. Va. SMRR 7C.02 (1985).

safety of the public." SMCRA § 521(a)(2), 30 U.S.C. 1271(a)(2). A Section 521(a)(2) order requires immediate "cessation of surface coal mining and reclamation operations" and imposes "affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm." *Ibid.*; see 30 C.F.R. 843.11(a)(1).

2. In July 1981, petitioner Monongah Development purchased rights to the coal remaining in the Monongah Mine. After leasing those rights to Pittsburgh Coal Works for a three-year period, Monongah leased "the remaining unmined merchantable coal," together with related "mining rights and privileges," to petitioner M & J Coal in November 1985. C.A. App. 380-393. In March and April 1986, WVDOE, responding to complaints of subsidence damage from Marion County residents Carl Dingus and Joseph Tarley, inspected M & J Coal's operations and reviewed its permit status. Pet. App. 7a-8a, 21a-22a. WVDOE issued a series of notices of violation (NOVs) that required M & J Coal to fill surface cracks, to cease operations until it secured a state permit, to notify surface owners of their intentions to mine under their property, and to submit a revised subsidence control plan. See *id.* at 7a-8a, 21a-22a; C.A. App. 399, 401, 403, 406, 412.[8]

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[8] WVDOE later withdrew its NOV concerning inadequate notice to surface owners (C.A. App. 406), accepting M & J Coal's contention that it had "not actually mined under the Tarley residence, only adjacent to it," and that the Tarleys, therefore, had not been entitled to notice. See *id.* at 407. However, the IBLA, in determining an appropriate penalty for M & J Coal's violations, rejected M & J Coal's notice argument, ruling that the Company had been required to provide notice to

M & J Coal submitted its initial subsidence control plan to WVDOE on April 14, 1986. That plan indicated that no effort would be made to prevent the subsidence of occupied dwellings. M & J Coal claimed to have acquired "legal rights" to cause subsidence damage to "approximately sixteen" privately owned structures "without liability."[9] The company promised to prevent subsidence of six surface features protected by state regulations—"two perennial streams, three public roads, and one high tension power pole." See AR T.309 (CR 4), Doc. 2 (Plan at 5-6). M & J Coal's plan indicated that the company would retain pillars and blocks of coal under those surface features in portions of the seam defined by a fifteen-foot setback and a fifteen-degree angle of draw. See Pet. App. 7a, 21a.[10]

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all surface residents within the angle of draw. *M & J Coal* v. *OSM*, 115 I.B.L.A. 8, 26 n.14 (1990).

[9] See Administrative Record Tab (AR T.) 309 (CR 4), Doc. 2 (Plan at 4-8). (The Administrative Record was filed with the trial court in May 1993.) The record does not disclose where those structures were or on which deeds M & J Coal relied as enforceable waivers of the right of subjacent support.

[10] Under those standards, limits on M & J Coal's full-extraction operations were to be established by (1) moving outward from the perimeter of each protected surface feature for a distance of fifteen feet; (2) dropping vertical lines from the extended perimeter downward through the coal seam; and (3) projecting a fifteen-degree angle, measured at the surface from the vertical, out into the coal seam. An explanatory diagram was included in M & J Coal's subsidence control plan. See AR T.309 (CR 4), Doc. 1 (at 8); see also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 477 n.7 (1987) (describing Pennsylvania's use of a fifteen-degree angle of draw as a benchmark for subsidence protection). The court of appeals was incorrect in its statement (see Pet. App. 7a n.2) that the angle of draw was to have been measured from the "roof of the mine,"

On April 25, 1986, WVDOE approved M & J Coal's initial plan and authorized the company to resume mining. Pet. App. 7a, 22a. On that same date, Joseph Tarley contacted OSM with information concerning additional, more severe subsidence damage to his property. *Id.* at 22a-23a; C.A. App. 29. Tarley stated that he and his wife were moving out of their house to escape subsidence-related hazards. As he recounted in a later affidavit:

> The needle on the gas meter had been spinning wildly. The section of the gas line immediately adjacent to the gas meter was severed. My water line to the public water supply also broke, and the access wires that the electric company had installed outside our house were leaning and stretching as tight as a fiddle string.

Pet. App. 22a-23a.

Upon receiving Tarley's call, OSM inspectors returned to the Tarley property. The inspectors became concerned that "people would fall into the subsidence cracks or a distressed structure would collapse on an individual" and that additional subsidence could affect "up to 16 homes" in the vicinity, "along with public roads, utilities, and a stream." C.A. App. 28. The inspectors contacted WVDOE and requested that the State use its authority under WVSCMRA to abate the hazard. State regulators declined to act on the ground that they considered M & J Coal to be in compliance with state law. Pet. App. 24a. OSM officials concluded, however, that M & J Coal's operations posed an imminent danger to the health and safety of the public.

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rather than from the surface of the earth, although the error did not affect its legal analysis.

OSM therefore issued a cessation order, dated April 25, 1986, directing M & J Coal to halt its operations until it had safeguarded the public from surface cracks, restored the land's capacity to support prior uses, and revised its subsidence control plan "to ensure that the health and safety of the general public [would] not be endangered." C.A. App. 35; see Pet. App. 8a-9a, 24a-25a. Five days later, M & J Coal proposed to revise its subsidence control plan to increase (to thirty degrees) the angle of draw used to limit mining under protected surface features and to treat occupied houses as protected features. *Id.* at 9a, 25a. Based on M & J Coal's agreement to make those revisions, OSM lifted its cessation order. *Ibid.*

3. M & J Coal sought administrative review of OSM's cessation order and its related recommendation that M & J Coal be required to pay a $2,700 fine. An Administrative Law Judge (ALJ) in the Department of the Interior's Office of Hearings and Appeals upheld OSM's actions as a valid exercise of its authority under SMCRA Section 521(a)(2). C.A. App. 74-87. In the ALJ's view, events at the Tarley and Dingus residences fully supported OSM's finding that M & J Coal had caused "imminent danger to the health or safety of the public." OSM, the ALJ found, "would have been grossly remiss in its enforcement role had it not ordered a cessation of M & J's underground coal mining operations." *Id.* at 82; see *id.* at 86 (assessing civil penalty of $3,500).

The ALJ's ruling was affirmed by the Interior Board of Land Appeals (IBLA). The IBLA found that the effects of the subsidence, including ruptured gas and water lines, shifted electric utility poles, and a crack in the ground so large that a dog fell in and died before rescuers could reach it, "present[ed] a graphic picture

of an imminent danger situation." *M & J Coal* v. *OSM*, 115 I.B.L.A. 8, 23 (1990); see C.A. App. 264-265. Accordingly, the IBLA concluded that OSM's cessation order had been fully authorized by Section 521(a)(2) of the SMCRA. M & J Coal did not seek judicial review of the IBLA's decision. See Pet. App. 9a, 15a.

4. In April 1992, petitioners filed suit in the Court of Federal Claims (CFC), alleging that OSM's actions had effected a taking of two categories of coal deposits: (1) portions of the seam that were placed off-limits by the change from a fifteen-degree to a thirty-degree angle of draw to delineate the area of support under protected surface features; and (2) portions of the seam that were placed off-limits by the extension of subsidence protection to occupied dwellings. The CFC granted the United States' motion for summary judgment. Pet. App. 17a-38a. The court pointed out that petitioners had acquired their interests in the Monongah Mine after Congress directed OSM, in Section 521(a)(2) of the SMCRA, to halt mining practices that endanger the public health and safety. That provision, the CFC found, precluded petitioners from forming a compensable expectation that they would be able to mine under a fifteen-degree subsidence control plan or to cause subsidence damage to occupied houses. Pet. App. 33a, 36a. The court noted that the validity of OSM's cessation order as an exercise of its mandate under Section 521(a)(2) had been definitively established by the final, unchallenged decision of the IBLA. Pet. App. 33a & n.3.

5. The court of appeals affirmed. Pet. App. 3a-16a. The court concurred in the CFC's determination that petitioners had never acquired the property rights that OSM's cessation order was alleged to have infringed. *Id.* at 13a. The court ruled that M & J Coal

"knew or should have known" in November 1985, when it leased its mining rights from Monongah Development, "that it could not mine in such a way as to endanger public health or safety." *Id.* at 14a.[11] In the view of the court of appeals, the IBLA's ruling that OSM had acted properly to avert an imminent threat to public health and safety was "incontestable" in light of M & J Coal's failure to seek judicial review, *ibid.*, and foreclosed the argument that OSM had impermissibly transferred property from petitioners to the Dingus and Tarley families, *id.* at 15a-16a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.

1. "[T]he range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments" is defined by "existing rules or understandings that stem from an independent source such as state law," and "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings.'" *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). By July 1981, when Monongah Development acquired its interest in the Monongah Mine, the surface effects of underground mining were strictly regulated under

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[11] The court did not discuss the rights that Monongah Development acquired in July 1981, see page 6, *supra*, though the same limitations clearly existed at that time, since Section 521(a)(2) of the SMCRA dates from 1977.

both federal and state law. Because those restrictions on petitioners' mining activities "inhere[d] in the title itself," *Lucas*, 112 S. Ct. at 2900, application of the federal regulatory scheme could effect no compensable taking.

Petitioners contend (Pet. 19-22) that under West Virginia law their proposed mining activities would have constituted at most a private nuisance; that the Dingus and Tarley families would have been entitled to no state-law remedy because their predecessors in interest had relinquished by contract all rights of subjacent support for the relevant surface estates; and that the restrictions imposed by OSM went beyond those imposed by background principles of state property law. That argument is flawed in two respects.

First, federal law is itself a source of "relevant background principles," *Lucas*, 112 S. Ct. at 2901, that may serve to define the scope of constitutionally protected property interests. In *Lucas*, this Court identified the federal navigational servitude at issue in *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900), as an example of a "pre-existing limitation upon the landowner's title" that may foreclose a claim for compensation. 112 S. Ct. at 2900; accord *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 703-704 (1987). This Court has frequently looked to rules and understandings supplied by federal law to assess the expectations that takings claimants could reasonably have entertained at the time of their investments.[12] Since petitioners

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[12] See, *e.g.*, *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993) (pension plan liabilities); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) (same);

acquired their mineral interests well after passage of the SMCRA, they can assert no rights inconsistent with the Act's requirements.[13]

It is far from clear, moreover, that the OSM cessation order actually imposed restrictions going beyond those applicable under state law. Since 1980,

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Ruckleshaus v. *Monsanto Co.*, 467 U.S. 986, 1006-1007 (1984) (pesticide safety data supplied to the government); see also *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1074-1075 (Fed. Cir. 1994) (shareholder in bank that federal regulators took over lacked "historically rooted expectation of compensation" required to support taking claim); *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955, 958-959 (Fed. Cir.) ("history of governmental regulation of savings and loan associations" precluded owner from asserting "historically rooted expectation of compensation" for federal takeover), cert. denied, 113 S. Ct. 324 (1992).

[13] Petitioners also assert (Pet. 18) that OSM misused its authority under Section 521(a)(2) of the SMCRA to confer "economic benefits on the Dingus and Tarley families alone, at the expense of petitioners," and that OSM's actions therefore "cannot be said [to have] substantially advanced a legitimate public interest." That characterization of OSM's actions is foreclosed, as both lower courts noted (see Pet. App. 15a-16a, 33a & n.3), by the IBLA's determination, which petitioners declined to challenge in district court, that OSM acted properly to abate an imminent threat to the public health and safety. Under established principles of Tucker Act jurisdiction, the IBLA's determination was not subject to collateral attack in petitioners' suit for compensation. See *id.* at 15a, 33a (citing *Florida Rock Indus.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987)); accord, *e.g.*, *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802-803 (Fed. Cir. 1993). Petitioners' characterization of OSM's actions is also contradicted by the record, which makes clear that the subsidence caused by petitioners' mining activities created hazards (*e.g.*, the increased risk of a gas explosion, an electrical fire, or a gap in a public road) to the public generally.

West Virginia has had its own statutory prohibition on mining practices that create an "imminent danger to the health or safety of the public," 1980 W. Va. Acts ch. 87, § 20-6-16(a) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) and (c)-(d) (1994))—a prohibition virtually identical to SMCRA Section 521(a)(2).[14] The IBLA's determination that M & J Coal's operations threatened the public health and safety also has implications under West Virginia's common law of nuisance. Under West Virginia law, a valid waiver of the right of subjacent support shields a mineral estate owner from most tort claims by the owner of the unsupported surface estate.[15] But the

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[14] Petitioners point out (Pet. 7, 15) that WVDOE officials were prepared, on April 25, 1986, to allow M & J Coal to operate under its initial subsidence control plan, notwithstanding reports from the Tarley and Dingus homes. But state officials' spur-of-the-moment assessment that M & J Coal's initial subsidence control plan satisfied West Virginia law, an assessment reached in response to federal officials' request for immediate state action, was neither final nor conclusive. Indeed, WVSCMRA includes a citizen-suit provision, see W. Va. Code § 22-3-25(a)(1) (1994), to ensure that state courts are able to correct state regulators who have taken an unduly limited view of their responsibilities under WVSCMRA. The decision of WVDOE officials not to issue a state cessation order neither reflected nor created a state-law right for M & J Coal to mine under its initial subsidence control plan.

[15] See, *e.g.*, *Winnings* v. *Wilpen Coal Co.*, 59 S.E.2d at 658-661. But see *Stamp* v. *Windsor Power House Coal Co.*, 177 S.E.2d at 150 (waivers may only bar "recovery for *negligence*," not for "wilful or wanton" acts); *Johnson* v. *Junior Pocahontas Coal Co.*, 234 S.E.2d 309, 313, 314 (W. Va. 1977) (coal company's reservation of right to produce coal "without liability for damage and injury to and destruction of the surface" cannot "be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant's violations of rules,

subsidence that prompted OSM to act in this case threatened harm to parties outside the chains of title to the severed mineral and surface estates. Dangers associated with ruptured gas, electrical, and water lines are not confined to the boundaries of the surface estate where the subsidence occurs. Since deed-based immunity from liability for subsidence harms reaches only to the boundary of the unsupported surface estate, see note 1, *supra*, any deed-based rights that petitioners acquired to subside occupied dwellings were limited by the protections that West Virginia nuisance doctrine provides to neighboring property owners and to the public at large.[16]

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regulations and laws, its wilful, wanton and reckless actions and conduct, or its creation of hazardous or nuisance conditions incident to its strip mining operations").

[16] West Virginia law concerning the construction of severance deeds may also limit petitioners' rights to subside occupied dwellings. West Virginia's Supreme Court of Appeals has emphasized that broad form waiver provisions must be "construed in light of the conditions and reasonable expectations of the parties." *Cogar* v. *Sommerville*, 379 S.E.2d 764, 769 (W. Va. 1989). Thus, "mining methods not contemplated at the time of the severance deed may not be utilized." *Ibid.*; see *Brown* v. *Crozer Coal & Land Co.*, 107 S.E.2d 777, 786-787 (W. Va. 1959) (auger mining was not contemplated by sellers of mineral estates and, therefore, not covered by waiver). But cf. *Ball* v. *Island Creek Coal Co.*, 722 F. Supp. 1370, 1372-1374 (W.D. Va. 1989) (because longwall mining is different from early forms of subsurface mining in degree, not in kind, subsidence damage from longwall mining falls within scope of broad form waiver). Petitioners have repeatedly acknowledged that M & J Coal was able to extract profitable quantities of coal from the twice-worked Monongah Mine only by exploiting "advances * * * in mining equipment and technology" that allowed significantly higher rates of extraction. Pet. 4; see Pet. App. 19a.

In sum, legal principles in existence when petitioners acquired their mineral interests sharply limited their right to subside the surface overlying the Monongah Mine. OSM's April 25, 1986, cessation order merely enforced those pre-existing limitations. Because a right to endanger public health and safety "w[as] not part of [petitioners'] title to begin with," *Lucas*, 112 S. Ct. at 2899, the cessation order could not effect a taking of petitioners' property.

2. Even if OSM's enforcement action had imposed new limitations on petitioners' mineral estates, those limitations would not rise to the level of a Fifth Amendment taking. In *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993), this Court reaffirmed the framework first articulated in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978), for evaluating regulatory takings claims. That approach focuses on "three factors with particular significance" for assessing whether a land use restriction effects a Fifth Amendment taking: (1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant. See *Concrete Pipe*, 113 S. Ct. at 2291 (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986)). Under that framework, the limitations on mining at issue here would not effect a taking even if they had been imposed after petitioners acquired their mineral interests.

Essentially for the reasons discussed above, the first two factors strongly indicate that no taking occurred here. OSM issued its cessation order in furtherance of its statutory mandate to abate "an

imminent danger to the public health and safety." SMCRA § 521(a)(2), 30 U.S.C. 1271(a)(2). Two administrative tribunals rejected M & J Coal's arguments that OSM had exceeded the scope of that mandate, and petitioners declined to seek direct judicial review. Moreover, the requirements of the SMCRA (at least as applied in this case) differ little, if at all, from applicable state-law norms. Accordingly, petitioners can establish no substantial interference with investment-backed expectations.

Nor have petitioners shown that OSM's cessation order imposed an onerous economic burden. Petitioners have not disputed the CFC's finding that M & J Coal realized profits of $692,086.41 from the Monongah Mine during the period from 1985 through 1989—a 34.5% annual rate of return on its initial investment. Pet. App. 28a; see *id.* at 10a n.5 (court of appeals' recitation of CFC figure); see also Pet. C.A. Reply Br. 4 (concession that "the Companies realized a profit on their efforts even after the taking"). Although the record does not disclose Monongah Development's profits, Monongah also appears to have done quite well. After purchasing the rights to rework the Monongah Mine for $400,000 in July 1981, Monongah Development leased those rights to Pittsburgh Coal Works (PCW) on undisclosed terms for three years before leasing the mine to M & J Coal in 1985. See C.A. App. 380, 383, 386. Based on M & J Coal's sales figures for the period from 1986 through 1989 (the only years for which M & J Coal's sales figures were made available), it appears that Monongah Development's royalties for that period alone repaid

more than half of its initial investment.[17] The economic effects of the alleged infringement on petitioners' property interests, in short, provide no support for their takings claims. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495-496 (1987) (rejecting claim that anti-subsidence statute took coal operators' property, where plaintiffs failed to demonstrate that any mine had been rendered unprofitable).

Petitioners seek to avoid this analysis by claiming to have suffered a total loss of the value of a smaller parcel of property. See Pet. 17-19. The relevant property, they contend, is not the mineral estate that Monongah Development acquired in 1981, or even the diminished mineral estate that Monongah Development leased to M & J Coal in late 1985. Rather, petitioners claim a total taking of "defined blocks of coal," totalling 99,700 tons, that M & J Coal's revised subsidence plan allegedly required it to leave in place. Alternatively, they claim a total loss of the support estate underlying protected surface features. Pet. 12, 18-19.

Essentially the same arguments were squarely rejected by this Court in *Keystone*. Although the parties in that case had stipulated that a Pennsylvania anti-subsidence rule would require the plaintiffs "to leave approximately 27 million tons of coal in place," the Court found that this coal did "not constitute a separate segment of property for takings law purposes." 480 U.S. at 498; accord *Concrete Pipe*, 113 S.

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[17] See C.A. App. 107-110 (listing coal sales from the Monongah Mine totaling $5,666,667 for the period from 1986 to 1989); *id.* at 386 (M & J Coal's agreement to pay royalties set at 4% of gross sales).

Ct. at 2290 (property cannot be "divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").[18] The Court also refused to segment the mine operators' mineral interests by treating the "support estate" as a separate form of property that had been rendered valueless. The Court acknowledged that Pennsylvania property law, which was "apparently unique" in this respect, treated "the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate." 480 U.S. at 500. The Court found, however, that its earlier takings decisions "foreclose[d] reliance on such legalistic distinctions within a bundle of property rights." *Ibid.* (citing *Penn Central*, 438 U.S. at 130 (air rights), and *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (right to sell property)); see *Keystone*, 480 U.S. at 501 (noting that the only practical value of the support estate is as a complement to either the surface or the mineral

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[18] The *Keystone* dissent, citing the parties' stipulation that 27 million tons of coal had been locked in place by the statute and regulations at issue there, would have treated the retained coal as a distinct segment of property under the circumstances of that case. 480 U.S. at 514, 517-518 (Rehnquist, C.J., dissenting). Here, however, there is no such stipulation. In fact, it is possible that petitioners could have substituted other forms of support for retained coal deposits. See W. Va. CSR 38-3-12(a)(7)(A) and (D) (1991) (authorization for operators to use "backstowing" or "backfilling" as alternatives to coal retention). Petitioners offered no evidence that such alternatives were technically or economically infeasible in the Monongah Mine.

estate).[19] The Court thus squarely rejected the arguments advanced by petitioners here. Petitioners' takings claim would therefore fail even if OSM's enforcement action had infringed on rights inherent in their title.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19] The *Keystone* dissent took the position that Pennsylvania's atypical treatment of the right of subjacent support provided alternative grounds for segmentation. See 480 U.S. at 520 & n.8. That argument for segmentation of the support estate has no application to the instant case. Although petitioners insist (Pet. 23) that their right of subjacent support represents a "distinct property interest," the only authorities cited in support of that proposition are two state trial court opinions (see Pet. App. 39a-48a), neither of which suggests that West Virginia treats this right as a "third estate" that can be conveyed independently of surface and mineral rights.